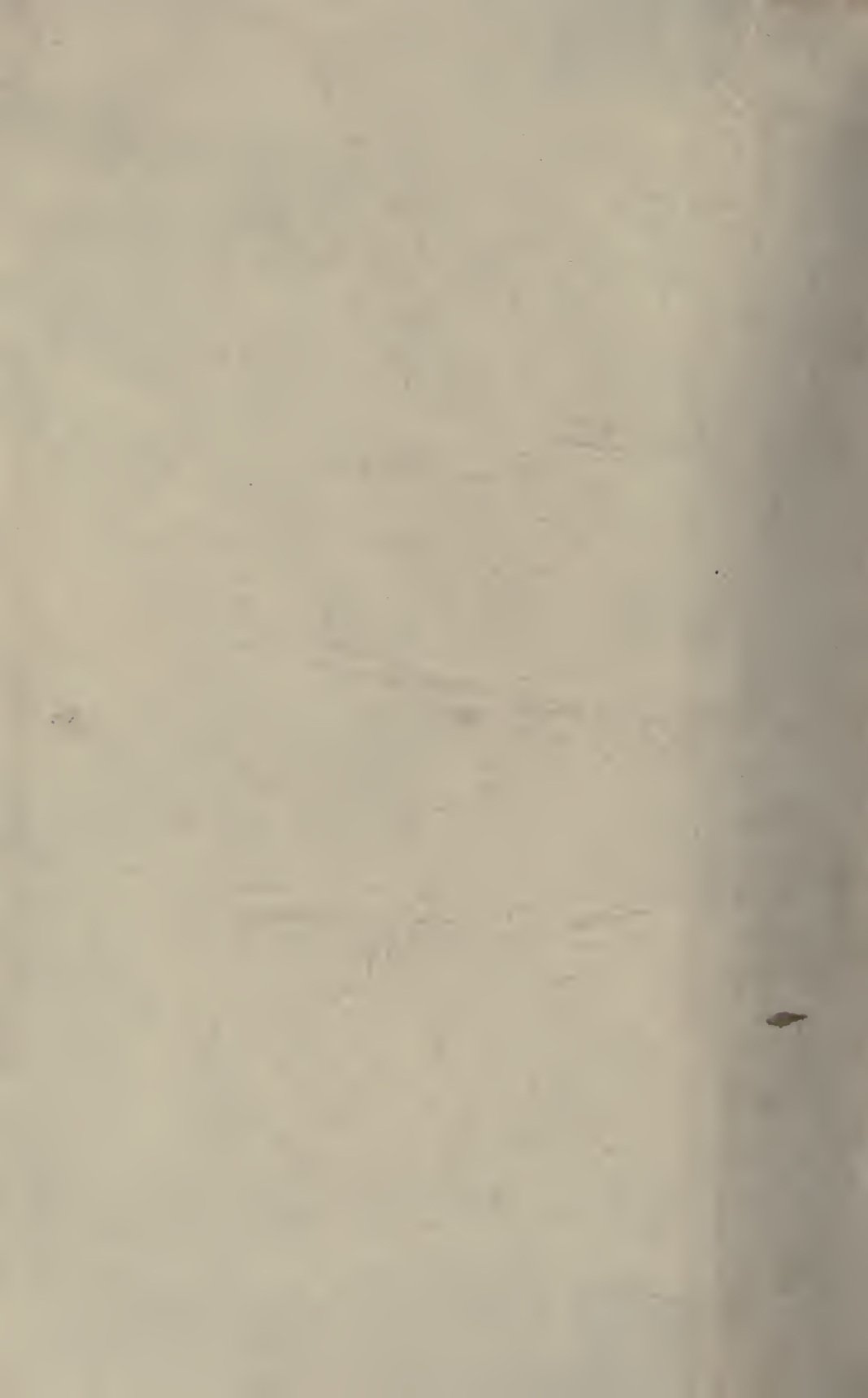




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THE

PUNJAB RECORD,

OR

Reference Book for Civil Officers,

CONTAINING

THE REPORTS OF CIVIL AND CRIMINAL CASES DETERMINED BY
THE CHIEF COURT OF THE PUNJAB AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM
THAT COURT, AND DECISIONS BY THE FINANCIAL
COMMISSIONER OF THE PUNJAB.

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JUDGES :

THE HON. MR. JUSTICE F. A. ROBERTSON—(*On leave till 15th October 1911*).

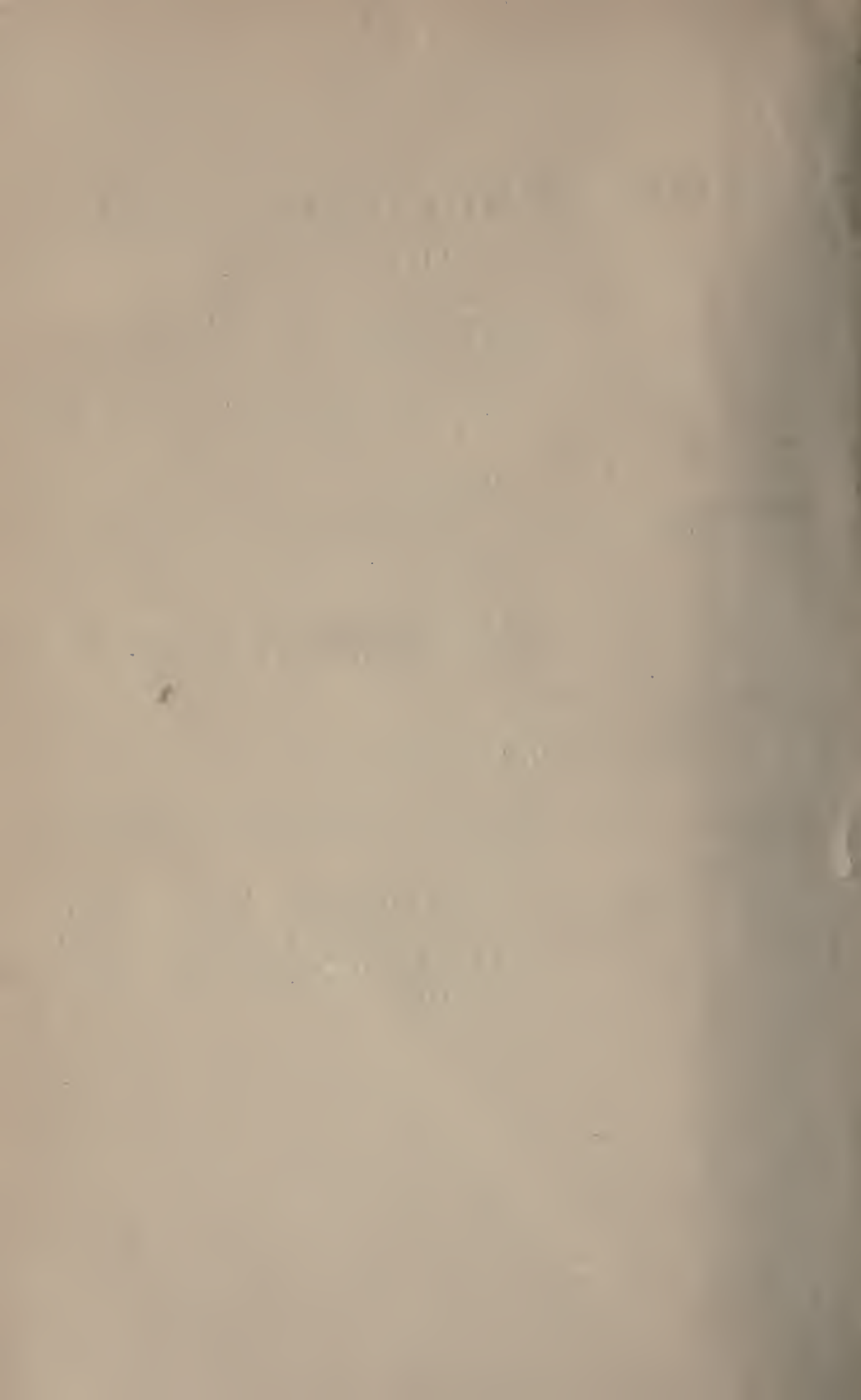
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„ „ „ D. C. JOHNSTONE.

„ „ „ H. A. B. RATTIGAN.

„ „ „ SHAH DIN, K. B.—(*Temporary Additional Judge*).

„ „ „ W. CHEVIS—(*Temporary Additional Judge from 1st January 1911 to 14th August 1911 and from 16th October 1911 to 31st December 1911*).



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Held also, that an objection that the amended decree is not in conformity with the compromise, on which the decree is based, can only be taken in appeal from the decree and not in revision from the order amending the decree.

Held further, that the word "Haqiyat" means rights in immovable property and though used as a rule in connection with landed property, there is nothing to prevent its application to house property also.

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(6) Court-fee in appeals in redemption suits.

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(7) *Held*, that no appeal lies, as of right to the Chief Court from an order passed by the Divisional Court upon an application made by the Deputy Commissioner under section 21 A (2) of the Punjab Alienation of Land Act for revision of the order of an executing Court sanctioning the sale of the judgment-debtor's mortgage rights in agricultural land to the decree-holder.

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... .. *Asa Singh v. Buta*—No. 12 P. R. 1911.

(8) *Appeal from order of remand under order XLI, rule 23, Civil Procedure Code, 1908—section 105 and order XLIII, rule 1 (u)—Punjab Courts Act, XVIII of 1884, section 40.*—There were three appeals before the Chief Court against orders of remand by the Divisional Judge under order XLI, rule 23, Civil Procedure Code, 1908, *viz.*—

(1) in a land suit of jurisdictional value of Rs. 707-2-0 ;

(2) in a pre-emption case of jurisdictional value (*i.e.*, 30 times *jama*) of Rs. 406-10-6 ;

(3) in a small cause suit, value Rs. 1,170.

In all these three cases a further appeal would lie to the Chief Court under section 40 of the Punjab Courts Act, if the Divisional Judge's decree varied or reversed, otherwise than as to costs, the decree of the Court below and not otherwise.

Held, that as it was impossible to say whether the decree which might have been passed by the Divisional Judge, had he not remanded the case, would have "varied or reversed otherwise than as to costs," the decree of the Court below and whether a further appeal would lie or not from the Divisional Judge's decree, no appeal lay under order XLIII, rule 1 (u) of the Civil Procedure Code, against the orders of remand in these three cases.

... .. No. 50 P. R. 1911.

ARAINS.

(1) *Held*, that among Arains of *mauza* Dholewala, *tahsil* Zira, District Ferozepore, a sonless proprietor has by custom the power to make a gift of a portion of his ancestral land in favour of his daughter, whose husband is the donor's *ghar jawai* or resident son-in-law.

See *Custom (Alienation)* (10).

... .. *Karm Din v. Mussammat Jio*—No. 13 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

ARAINS—concl'd.

(2) (Jullundur city) adoption of step-son invalid.

See *Custom (Adoption)* (4).

... .. No. 45 P. R. 1911.

ARBITRATION.

(1) *Arbitration—pendente lite—Agreement to refer, made by parties out of Court—Application presented to Court by one party only—Civil Procedure Code, Act V of 1908, Schedule II, Article I.*—Where a suit was instituted in June 1910 and on 3rd October parties agreed out of Court to nominate certain arbitrators to decide their dispute and in pursuance of the agreement had a petition to the Court written out, and owing to the Judge's absence for some days, the petition could not be used until 17th October, when plaintiff *alone* presented it in Court, defendant denying having agreed to arbitration and refusing to join in the presentation—

Held, that not only the writing out of an application, but the presentation of it, must have the concurrence of all the parties, to fulfil the requirements of Article I of Schedule II of the Civil Procedure Code, 1908, and that the lower Court was consequently right in rejecting the application.

... .. *Miran Bakhsh v. Sher Muhammad*—No. 17 P. R. 1911.

(2) Agreement containing a clause for reference to arbitration—when bar to a suit.

See *Specific Relief Act* (3).

... .. *Udhe Singh v. Sardar Bishen Singh*—No. 25 P. R. 1911.

(3) *Arbitration—Application for reference to arbitration—Several causes of action joined in one application—Nomination of arbitrator by Court—Difference between the old and new Code—Civil Procedure Code, Act V of 1908, section 141, schedule I, order 2, rule 3 and clause 17 of the Second Schedule—Civil Procedure Code, Act XIV of 1882, section 523—Material irregularity.*—*Held*, that order 2, rule 3 of the First Schedule, read with section 141 of the Civil Procedure Code, 1908, enables a Court to allow plaintiffs to join several causes of action in one application to file in Court agreements to refer to arbitration under clause 17 of the Second Schedule.

Held also, that section 523 of the old Civil Procedure Code, 1882, differed materially from the provisions of clause 17 of the Second Schedule of the present Civil Procedure Code, 1908, inasmuch as under the former it was necessary that the arbitrators should be named in the agreement, but in clause 17 there is no reference to "arbitrators named" and the sole provision is that the reference is to be to the arbitrators "appointed in accordance with the provisions of the agreement." Where a Court, in contravention of the express agreement between the parties and the imperative terms of the Civil Procedure Code, appointed an arbitrator who did not come under the terms of that agreement, it committed an irregularity which materially prejudiced the plaintiffs.

... .. *Dreyfus & Co. v. Gurditta Mal*—No. 35 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

ARBITRATOR.

Nomination of—by Court on application to refer to arbitration.

See *Arbitration* (3).

... .. *Dreyfus & Co. v. Gurditta Mal*—No. 35 P. R. 1911.

AWANS.

Talagang *tahsil*—power of father to alienate in presence of a son.

See *Custom (Alienation)* (5).

... .. No. 88 P. R. 1911.

B

BILL OF EXCHANGE.

Bill of exchange—Hundi—payable so many days after date—presentation for acceptance and payment—Negotiable Instruments Act, XXVI of 1881, section 83.—Held, that the words "all previous parties" appearing in section 83 of the Negotiable Instruments Act, 1881, include the drawer.

Held also, that this section applies only to bills of exchange in which acceptance by the drawer is obligatory, i.e., a bill of exchange after sight, as defined in section 21 of the Act, and does not apply to the ordinary hundi of the country payable after a certain number of days which comes under the class of bills requiring presentation for payment only and not for acceptance.

... .. *Khan Chand v. Golab Ram*—No. 39 P. R. 1911.

BRAHMINS.

Brahmins of *manza* Dharmsala, *tahsil* Una, district Hoshiarpur, are governed in matters of alienation by agricultural custom.

See *Custom (Alienation)* (4).

... .. *Daswandi v. Mahant Krishen Dev*—No. 34 P. R. 1911.

BURDEN OF PROOF.

(1) As to succession of daughters to the exclusion of collaterals among Naru Rajputs of *tahsil* Phillour, district Jullundur.

See *Custom (Succession)* (1).

... .. *Khair Khan v. Ghulam Ghaus*—No. 32 P. R. 1911.

(2) As to proving the testamentary capacity of the testator.

See *Will* (3).

... .. *Bur Singh v. Uttam Singh*—No. 21 P. R. 1911 (P. C.).

(3) As to proving the validity of gift in favour of daughters among Tarkhans of Sialkot District.

See *Custom (Alienation)* (3).

... .. *Rahim Bakhsh v. Natha*—No. 23 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

BURDEN OF PROOF—*concl'd.*

(4) As to proving refusal to submit to arbitration by plaintiff in a case based on an agreement containing a clause for reference to arbitration.

See *Specific Relief Act* (3).

... .. *Udhe Singh v. Sardar Bishen Singh*—No. 25 P. R. 1911.

(5) An entry in the record of rights and *riwaj-i-am* unsupported by any instances is not sufficient to discharge the *onus* on pattidars, to prove preferential rights to daughters in succession.

See *Custom (Succession)* (2).

... .. *Devi Singh v. Mussammat Premi*—No. 11 P. R. 1911.

(6) As to Sodhi Khatris of *mauza* Thathi Khara, Tarn Taran *tahsil* of the Amritsar district, being governed by agricultural custom and not Hindu Law.

See *Custom (Alienation)* (7).

... .. *Gangu v. Kanshi Ram*—No. 28 P. R. 1911.

(7) As to Sodhi Khatris of *mauza* Bhamipura, *tahsil* Jagraon, district Ludhiana, following agricultural custom.

See *Custom (Alienation)* (2).

... .. No. 43 P. R. 1911.

(8) As to validity of adoption of daughter's son among Jats, Garhshankar *tahsil*, Hoshiarpur district.

See *Custom (Adoption)* (3).

... .. No. 44 P. R. 1911.

(9) As to validity of adoption of step-son among Arains—Jullundur city.

See *Custom (Adoption)* (4).

... .. No. 45 P. R. 1911.

C

CAUSE OF ACTION.

Several causes of action joined in one application for reference to arbitration.

See *Arbitration* (3).

... .. *Dreyfus & Co. v. Gurditta Mal*—No. 35 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

CHAIRMAN

Of meeting of shareholders of a Company, not liable to damages for giving wrong decision on a point before him at the meeting.

See *Companies*.

... .. No. 46 P. R. 1911.

CHILD.

Born 330 days after last access of parents—legitimacy of—

See *Divorce* (2).

... .. No. 77 P. R. 1911.

CHUNDAWAND OR PAGWAND.

Succession—among Musalman Jats, Gurdaspur *tahsil*—*Riwaj-i-am*.

See *Custom (Succession)* (5).

... .. No. 58 P. R. 1911.

CIVIL PROCEDURE CODE, 1882.

(1) SECTION 206.

See *Amendment of Decree*.

... .. *Bawa Singh v. Lachhman Singh*—No. 24 P. R. 1911.

(2) Section 523—difference between old and new Code—regarding application to refer to arbitration.

See *Arbitration* (3).

... .. *Dreyfus & Co. v. Gurditta Mal*—No. 35 P. R. 1911.

(3) *Civil Procedure Code, 1882, section 260*—*Sale of attached property—strict compliance with terms of section.*—Held, that no sale can be ordered under section 260, Civil Procedure Code, 1882, unless the conditions laid down in that section have been strictly complied with, *viz.*, (a) a valid original attachment, (b) application *within* one year of that attachment by decree-holder for sale, and (c) lapse of one year from date of attachment, and that consequently no such order could be made when the decree-holder applied to have the property sold more than a year after its attachment.

... .. No. 69 P. R. 1911.

CIVIL PROCEDURE CODE, 1908.

(1) SECTION 2 (2).

Orders—as to Court-fee, security to be taken from plaintiff, how profits are to be determined, and on objection under Pension Act—not preliminary decrees.

See *Decree or Order* (2).

... .. No. 82 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

CIVIL PROCEDURE CODE, 1908—*contd.*

(2) SECTION 2 (2)—*concl'd.*

Order returning plaint for amendment, not a preliminary decree.

See *Decree or Order* (3).

... .. No. 96 P. R. 1911.

(3) SECTION 2, CLAUSES (2) AND (14).

See *Decree or Order* (1).

... .. *Kashi Nath v. Nathu Ram*—No. 41 P. R. 1911.

(4) SECTION 99.

Appellate Court cannot reverse decree of lower Court on ground of misjoinder, unless parties were materially prejudiced.

See *Companies*.

... .. No. 46 P. R. 1911.

(5) Section 141, schedule I, order 2, rule 3 and clause 17 of the Second Schedule.

See *Arbitration* (3).

... .. *Dreyfus & Co. v. Gurditta Mal*—No. 35 P. R. 1911.

(6) ORDER 1, RULE 10 (3).

No Company or person can be made a plaintiff in a suit without its or his express consent.

See *Companies*.

... .. No. 46 P. R. 1911.

(7) ORDER XXII, RULE 4 (3).

Imperative—plea of ignorance of death does not justify departure from the rule.

See *Appeal* (2).

... .. No. 60 P. R. 1911.

(8) Order XLIII, rule 1 (k)—*appeal from order of abatement.*—*Held*, that no appeal lies under order XLIII, rule 1 (k), where there has been no application to the Court to set aside an abatement.

... .. No. 95 P. R. 1911.

(9) ORDER XLIII, RULE 1 (u).

No appeal lies from an order of remand unless it can be predicated that a further appeal would lie from the Divisional Judge's decree.

See *Appeal* (8).

... .. No. 50 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

CIVIL PROCEDURE CODE, 1908—concl'd.

(10) SCHEDULE II, ARTICLE I.

Arbitration—pendente lite—Agreement to refer, made by parties out of Court—application presented to Court by one party only.

See *Arbitration* (1).

... .. *Miran Bakhsh v. Sher Muhammad—No. 17 P. R. 1911.*

COMPANIES.

*Companies—acts of directors, not properly appointed—Indian Companies Act, IV of 1882, section 92—Form of suit—error in—not ground for interference by Appellate Court—Company made plaintiff without its express consent—Civil Procedure Code, Act V of 1908, section 99, and order I, rule 10 (3)—Court's interference with matters of internal management—Chairman of meeting not liable to damages for coming to wrong decision.—Held, that acts *bonâ fide* done by a director or manager of a Company are valid, notwithstanding any defect that may afterwards be discovered in his qualification and this applies not only between the Company and outsiders, but also between the Company and its members—Indian Companies Act, 1882, section 92.*

Held also, that the form of a suit is not bad because the relief prayed for does not affect each defendant equally, and also that even if the suit had been open to objection on the ground of misjoinder, there having been no material prejudice to the defendants on the merits, the decree of the lower Court could not be reversed merely on this technical ground—Civil Procedure Code, section 99.

Held also, that a Company cannot be made plaintiff in a suit without its consent expressly given (order I, rule 10 (3) of the Code) and neither one or several shareholders can sue in the name of the Company unless they were authorised by the majority at a general meeting of the Company or shewed that they have exhausted all reasonable means of obtaining the institution of the suit by the Company or that the case is one of urgency and the plaintiff has the support of the majority.

Held also, that one or more shareholders suing on his or their own behalf cannot obtain in a Court of law a declaration that the election of certain persons as directors was null and void on account of irregularities or even illegalities in their election, nor an injunction to restrain those persons from acting as directors, these being matters relating exclusively to the internal management of the Company, with which Courts generally decline to deal at the instance of any person other than the Company itself.

*Held also, that a chairman presiding at a meeting of a Company has to decide to the best of his judgment all questions that arise at such meeting, e. g., the right of persons to vote or their disqualification, and if he acts *bonâ fide*, he is not liable to pay damages to any party, who can afterwards satisfy a Court of law, that a particular ruling of the chairman was erroneous or that it resulted in such party being deprived of a right to which he is subsequently found entitled.*

... ..

No. 46 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

COMPANIES (IN LIQUIDATION).

Companies in liquidation—Contributories—liability of, under section 151, Indian Companies Act, VI of 1882, in regard to unpaid calls made before winding up.—Held, that the contributions due under section 151 of the Indian Companies Act, 1882, include unpaid calls made before the winding up as well as calls made after the winding up.

... .. No. 67 P. R. 1911.

COMPANIES ACT.

See Indian Companies Act.

CONSENT

of next heir (a sonless man) to adoption of daughter's son, not binding on other collaterals.

See Custom (Adoption) (3).

... .. No. 44 P. R. 1911.

CONSIDERATION.

Sale—when complete without payment of consideration and when not—intention of parties.

See Sale (3).

... .. No. 55 P. R. 1911.

CONTRACT.

Joint—enforcement of, by one of the joint contractors where the others refuse to join him.

See Joint Contract.

... .. No. 57 P. R. 1911.

Sale—whether complete when consideration has not been paid—intention of parties.

See Sale (3).

... .. No. 55 P. R. 1911.

CONTRACT ACT.

See Indian Contract Act.

CONTRIBUTORIES.

Liability of—in regard to unpaid calls made before winding up.

See Companies (in liquidation).

... .. No. 67 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

CONSTRUCTION OF WORDS.

"*Maveshi*" as used in entries in *Wajib-ul-arz* in connection with grazing rights over *shamilat* land.

See "*Maveshi*."

... .. No. 86 P. R. 1911.

COURT FEES.

(1). Court fee in a declaratory suit to the effect that plaintiff is the real decree-holder of a decree obtained by defendant and to have decree transferred to him.

See *Declaratory Suit*.

... .. *Ganeshi Lal v. Beni Parshad*—No. 1 P. R. 1911.

(2). Court fees in appeals in redemption suits.

See *Court-fees Act* (1).

... .. *Banwari Das v. Nathu Shah*—No. 5 P. R. 1911.

COURT-FEES ACT.

(1) *Schedule I, Article 1*—*Court fees in appeals in redemption suits*.—Where the first Court found that the amount payable on redemption was Rs. 670 and on appeal the lower appellate Court reduced this sum to Rs. 190 and the prayer on further appeal to the Chief Court was that this sum be increased to Rs. 1,190—

Held, that article 1, Schedule I, of the Court-fees Act applied, the Court fee being payable on the value of the subject-matter in dispute in the appeal, *viz.*, Rs. 1,000.

Reference under Court-fees Act, 1870—(1906) *I. L. R.* 29 *Mad.* 367 followed.

... .. *Banwari Das v. Nathu Shah*—No. 5 P. R. 1911.

(2) ARTICLE 17, VI.

Court fee, where only question is to whom amount, admittedly due, is payable.

See *Hindu Law* (5).

... .. No. 71 P. R. 1911.

CUSTOM (ADOPTION).

(1) *Custom—adoption—validity of—among Bhabra Jains of Kaithal, Karnal district—bequest of co-parcenary property after adoption—Hindu Law*.—*Held*, that among Bhabra Jains of Kaithal in the Karnal district the adoption of a collateral in the 4th degree is valid by custom,

The references are to the Nos. given to the cases in the "Record."

CUSTOM (ADOPTION)—*concl'd.*

Held also, that the result of an adoption is to make the adopted son a co-parcener with the adoptive father in the joint family property, and that the latter was consequently incompetent to bequeath or devise any part of that property in the presence of the adopted son.

... .. No. 74 P. R. 1911.

(2) *Custom—Adoption—how manifested—registered deed of adoption—subsequent treatment—proof of.*—*Held*, that in a case where the power of customary adoption by a sonless proprietor is not disputed, all that is necessary to constitute an adoption is the clear expression of an intention on the part of the adoptive father to adopt the boy concerned as his son, and a sufficient manifestation of that intention, by the execution and registration of a deed of adoption coupled with a clear declaration in Court and subsequent treatment as adopted son.

Proof of such subsequent treatment cannot, however, be reasonably demanded in a case where very soon after the execution of the deed of adoption, the reversioners of the adoptive father sue for a declaration that the adoption did not in fact take place, and where therefore the adoptive father cannot *ex necessitate rei* prove continuous subsequent treatment.

... .. No. 42 P. R. 1911.

(3) *Custom—Adoption—Muhammadan Jats, Garhshankar tahsil, Hoshiarpur district—Adoption of daughter's son—presumption against its validity—Riwaj-i-am—consent of nearest collateral—Limitation in suit for possession—Indian Limitation Acts of 1877 and 1908, Schedule II, articles 118 and 144.*—*Held*, following the interpretation in 96 P. R. 1908 of the Privy Council Ruling reported in *Tirbhuan v. Rameshar*, (1906) I. L. R. 28 All. 727, that a suit for possession, where an adoption is set up in defence, is governed by article 144 and not article 118 of the Limitation Acts of 1877 and 1908 and that the Full Bench Ruling in 86 P. R. 1905 must be held to have been over-ruled by the Privy Council.

Held also, following 50 P. R. 1893 (F. B.) that the general presumption among Jats of the Garhshankar tahsil, Hoshiarpur district, is that the adoption of a daughter's son is invalid, and that no special custom in favour of its validity had been proved, the mere entry in the *Riwaj-i-am*, unsupported by instances, being insufficient for the purpose.

Held further, that the consent of the brother of the adoptive father (a sonless man) did not bind the more distant collaterals, the plaintiffs.

... .. No. 44 P. R. 1911.

(4) *Custom—Adoption of step-son—Arains—Jullundur city.*—*Held*, that the respondents, on whom the burden of establishing the custom was, had failed to prove that a sonless Arain of Jullundur city can adopt a step-son, who is not of his got.

... .. No. 45 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

CUSTOM (ALIENATION).

(1) *Madaris (jugglers), Ludhiana district, agriculturists bound by custom—necessity.*—Held, that the parties to the suit, *Madaris (jugglers)* of the Ludhiana district, though not among the agricultural tribes in the Census Report or in the list of agricultural tribes of the district compiled for the purposes of the Land Alienation Act, had by cultivating agricultural land for several generations as their only means of livelihood, adopted and rendered themselves subject to the ordinary agricultural law of the Central Punjab.

... .. *Bhola v. Razzaq Shah—No. 7 P. R. 1911.*

(2) *Custom (Alienation)—Succession—Daughters—Hindu Law—Sodhi Khatri, mauza Bhamipura, tahsil Jagraon, district Ludhiana.*—Held, that the initial presumption in the case of *Khatri* and especially of *Sodhi* is that they follow Hindu Law.

Held also, that it had not been proved that *Sodhi Khatri* of mauza *Bhamipura, tahsil Jagraon, district Ludhiana*, follow agricultural custom in connection with alienation of, or succession to, ancestral immovable property, and by Hindu Law collaterals in the 4th degree do not exclude daughters.

... .. *No. 43 P. R. 1911.*

(3) *Custom (Alienation)—Tarkhans, Sialkot district—Gift of ancestral land in favour of daughter valid to extent of one-twentieth only—onus probandi—Riwaj-i-ams 1865 and 1892 discussed.*—Held, that the defendants (*donees*), on whom the *onus* lay, had failed to prove that among *Tarkhans (carpenters)* of *Kotli Tarkhanan, tahsil Zafarwal* of the *Sialkot* district, by custom, a male proprietor is competent to gift more than a one-twentieth share of his ancestral land in favour of his daughter to the prejudice of his collaterals of the 5th degree.

The relative value of the *Riwaj-i-am* of 1865 and that of 1892 discussed.

... .. *Rahim Bakhsh v. Natha—No. 23 P. R. 1911.*

(4) *Custom (Alienation)—Brahmans of mauza Dharmasala, tahsil Una, district Hoshiarpur—Hindu Law.*—Held, that the parties to the suit *Brahmans of mauza Dharmasala in tahsil Una, district Hoshiarpur*, were governed in matters of alienation by agricultural custom and not by Hindu Law.

... .. *Daswandi v. Mahant Krishen Dev—No. 34 P. R. 1911.*

(5) *Custom (Alienation)—power of—among Awans, Talagang tahsil, Attock district—in presence of a son.*—Held, that plaintiff had failed to prove that by custom among *Awans* of the *Talagang tahsil, Attock* district, his father was incompetent to make an alienation of his ancestral property in his (*plaintiff's*) presence.

79 P. R. 1896, 53 P. R. 1899, 46 P. R. 1900 and 8 P. R. 1906 referred to.

... .. *No. 88 P. R. 1911.*

The references are to the Nos. given to the cases in the "Record."

CUSTOM (ALIENATION)—*contd.*

(6) Bukhari Sayads of mauza Fatehullah Shahwala, tahsil Zira, district Ferozepore—governed by agricultural custom and not Muhammadan Law.—Held, that Bukhari Sayads of mauza Fatehullah Shahwala, tahsil Zira, district Ferozepore, are governed by agricultural custom in matters pertaining to their powers as landowners and not by Muhammadan Law, and that consequently their power of alienation in respect of ancestral land is not unrestricted.

... .. No. 92 P. R. 1911.

(7) Custom (Alienation)—Alienation by father—suit to contest alienation by sons—Sodhi Khatri of mauza Thathi Khara, tahsil Tarn Taran, district Amritsar—onus probandi—Hindu Law.—Held, that the plaintiff on whom the onus lay, had failed to prove that Sodhi Khatri of mauza Thathi Khara, Tarn Taran tahsil of the Amritsar district, in matters of alienation were governed by agricultural custom and not by Hindu Law.

79 P. R. 1909 followed.

... .. Gangu v. Kanshi Ram—No. 28 P. R. 1911.

(8) Custom (Alienation)—Succession—Nature of immoveable property acquired out of savings from income of "ancestral" property.—Held, that a mortgage of land acquired by a female, subject to Punjab custom, is not "ancestral" property because the mortgage money was paid by her out of savings from her income derived from "ancestral" property.

... .. Mussammat Ishar Kour v. Raja Singh—No. 29 P. R. 1911.

(9) Custom (Alienation)—Exchange by widow—Necessity.—Held, that a widow, in possession of her deceased husband's land, is not authorised by custom to effect an exchange of land except for necessity.

... .. Mussammat Nihali v. Lehna—No. 2 P. R. 1911.

(10) Custom (Alienation)—Gift by sonless proprietor of part of his ancestral land to his daughter—Arains of mauza Dholewala, tahsil Zira, district Ferozepore.—Held, that among Arains of mauza Dholewala, tahsil Zira, district Ferozepore, a sonless proprietor has by custom the power to make a gift of a portion of his ancestral land in favour of his daughter whose husband is the donor's ghar-jawai or resident son-in-law.

... .. Karm Din v. Mussammat Jio—No. 13 P. R. 1911.

(11) Custom (Alienation)—Widow's right to alienate—Sayads of Sialkot city—Muhammadan Law.—Held, that although the initial presumption in the case of non-agricultural Sayads, residents of a city, is that they follow Muhammadan Law, yet where in defiance of that law, widows take over the whole of their husbands' immovable estate, a natural presumption arises that they do so, as life-holders only, subject to control by male reversioners.—Held therefore, that among the parties to the suit, Sayads of Sialkot city, there is a presumption in favour of a custom, under which alienations by a widow of house property inherited from her husband are liable to be contested by the husband's brother.

... .. Mir Haidar v. Muhammad Ali—No. 14 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

CUSTOM (ALIENATION)—*concl'd.*

(12) *Custom (Alienation)*—*Oral gift of ancestral land by sonless proprietor in favour of daughter's sons—validity of—Kalon Jats of tahsil Shakargarh, district Gurdaspur—Riwaj-i-am.—Held*, that among Kalon Jats of tahsil Shakargarh, district Gurdaspur, an oral gift of ancestral land by a sonless proprietor, followed by a mutation, in favour of his daughter's sons, whose father remained in the donor's house from the date of his marriage, is valid by custom under the *Riwaj-i-am* supported by instances.

... *Harnam Singh v. Lachman Singh—No. 16 P. R. 1911.*

(13) *Custom (Alienation)*—*gift of ancestral land by sonless Muhammadan Jat of mauza Tarag, tahsil Isa Khel, district Mianwali, to wife and daughter—validity of, in presence of collaterals in 5th degree—Riwaj-i-am—value of entries in new and old Riwaj-i-am.—Held*, that a gift by a sonless Muhammadan Jat of mauza Tarag, tahsil Isa Khel, district Mianwali, of ancestral land is valid in the presence of collaterals of the 5th degree.

Held also, that the *Riwaj-i-am* of 1907 presumably represents the custom of 1906 more accurately than a *Riwaj-i-am* 20 or 30 years older.

... *No. 72 P. R. 1911.*

(14) *Custom (Alienation)*—*Kureshis of Mianapura, Sialkot city—Muhammadan Law—onus probandi.—Held* that, although Kureshis of Mianapura, Sialkot city, do not in all matters follow Muhammadan Law, the burden of proving that the tribe follow a custom, under which alienations by a male proprietor are controllable by his reversionary heirs, is on the latter and that in default of such proof, personal law must be applied.

... *No. 63 P. R. 1911.*

CUSTOM DUTY.

Custom duty—refund of, on goods being again exported—Appeal to Commissioner on refund being refused—suit for refund—Punjab Municipal Act, XX of 1891—rules by Local Government—rule VI.—The plaintiffs sued the defendants for compensation for refusal to refund Re. 1-2-9 custom duty, when the goods on which the tax had been paid, were again exported by plaintiffs.

Held, that under rule VI of the rules made by the Local Government under section 154 (j) of the Punjab Municipal Act, XIII of 1884 (which were maintained in force under section 2 (2) of the Punjab Municipal Act, XX of 1891) the plaintiffs had an appeal to the Commissioner from the order refusing the refund—and that the plaintiffs were bound to exhaust their remedy by appeal before filing this suit.

Held, consequently, that the present suit was barred by the plaintiffs' failure to appeal.

... *Municipal Committee, Ambala, v. Mohander Singh—No. 38 P. R. 1911.*

The references are to the Nos. given to the cases in the "Record."

CUSTOM (INHERITANCE).

See *Custom (Succession)*.

CUSTOM (MARRIAGE).

Custom—Hindu Law—Evidence of karewa after long co-habitation—marriage between a Jhabra Rajput and a Tarkhan woman—validity of.—*Held*, that when a woman has been living with her alleged husband for a period of nearly 40 years and until his death, marriage may be presumed without precise evidence of the actual karewa.

102 P. R. 1880, 48 P. R. 1890, 13 P. R. 1898, 50 P. R. 1900, and 51 P. R. 1900, referred to.

Held also, that a marriage between a Jhabra Rajput and a Tarkhan woman is valid and their offspring legitimate.

Lachman Kuar v. Mardan Singh, (1886) I. L. R. 8 All. 143, *Inderun Valungy Pooley v. Ramasavmy Pandia*, (1869) 13 M. I. A. 141, 51 P. R. 1900, 72 P. R. 1908 and 57 P. R. 1909, referred to.

... .. No. 65 P. R. 1911.

CUSTOM (PAROHIT AND JUJMANS).

No declaratory suit lies in respect of a so-called right to realize *birt*—relation between *parohit* and his *jujmans* discussed.

See *Decree or Order* (3).

... .. No. 96 P. R. 1911.

CUSTOM (PRE-EMPTION).

(1) *Mohalla Acharjan, Gumti Bazar, Lahore.*—*Held*, that it had not been proved that the custom of pre-emption prevailed in *Mohalla Acharjan*, which is part of the recognised sub-division of *Bazar Gumti* in the Lahore city.

... .. No. 91 P. R. 1911.

(2) *Custom—Pre-emption—Mohalla Mimaran alias Pansarian, Kaithal—value of proof of uncontested instances and instances in neighbourhood of the mohalla.*—*Held*, that the custom of pre-emption of houses exists in *Mohalla Mimaran alias Mohalla Pansarian*, a sub-division of *Kaithal*.

Held also, that instances of pre-emption in the neighbourhood of the *mohalla* in question may indicate the existence of custom of pre-emption in that *mohalla* and that uncontested instances are by no means worthless evidence of the existence of right.

71 P. R. 1905, 38 P. R. 1906, 99 P. R. 1906, 120 P. R. 1906, 67 P. R. 1907, 138 P. R. 1907, 44 P. R. 1903 and 26 P. R. 1907, referred to.

... .. No. 78 P. R. 1911.

(3) *Pre-emption in respect of sale of a house or shop in a lane in Bazar Baba Malak in the town of Nakodar—Punjab Pre-emption Act, II of 1905. Section 6.*—*Held*, that plaintiff, on whom the *onus* lay, had failed to

The references are to the Nos. given to the cases in the "Record."

CUSTOM (PRE-EMPTION)—*concl'd.*

prove that the custom of pre-emption existed in the Baba Malak sub-division of the town of Nakodar at the time of commencement of the Punjab Pre-emption Act, 1905, and that his suit for pre-emption must accordingly be dismissed.

... .. No. 59 P. R. 1911.

(4) *Custom—Pre-emption—Lahore city—Mohalla Sathan—house converted into a Dharamsala subsequent to sale—Punjab Pre-emption Act, II of 1905, section 13 (2).—Held, that a custom of pre-emption in respect of houses exists in Mohalla Sathan in the city of Lahore.*

Held also, that where at the date of sale the property sold was a house and subsequently it was converted into and used as a Dharamsala, it is immaterial for the purposes of sub-section (2) of section 13 of the Punjab Pre-emption Act to consider such conversion, inasmuch as it is the character of the property sold at the date of sale which determines the question of the applicability of the said sub-section.

... .. Mahant Kirpa Singh v. Maya Ram—No. 22 P. R. 1911.

See also Pre-emption.

CUSTOM—(SUCCESSION).

(1) *Custom—Succession—Succession of daughters—Naru Rajputs, tahsil Phillour, district Jullundur—onus probandi.—Held, that the defendants, on whom the onus lay, had failed to prove that among Naru Rajputs of the Phillour tahsil of the Jullundur district daughters of a sonless male proprietor succeed to the exclusion of the collaterals.*

... .. Khaire Khan v. Ghulam Ghaus—No. 32 P. R. 1911.

(2) *Custom—Succession—generally daughter succeeds in preference to pattidars—Wajib-ul-arz—Riwaj-i-am—Onus probandi—Jats of mauza Kharindwa, tahsil Thanesar, district Karnal.—Held, that exclusion of daughters by pattidars is opposed to the general custom, and that the burden of proving a special custom entitling them to exclude the daughter is on the pattidars.*

Also, that an entry in the record of rights and Riwaj-i-am in their favour, unsupported by any instances, is not sufficient to discharge the onus and that the onus had not been discharged.

... .. Devi Singh v. Mussammat Premi—No. 11 P. R. 1911.

(3) *Custom—Succession to gifted land on death of donee sonless—daughter's succession—reversion to donor.—Held, that in the absence of proof of a special custom daughters of the donee, who has died sonless, succeed in the same way as sons, and that they pass on the succession to their children, the land reverting to the donor's line, only in the event of the total extinction of descendants of the donee.*

84 P. R. 1909 followed.

... .. No. 68 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

CUSTOM (SUCCESSION)—*concl'd.*

(4) *Custom (Succession)*—widow of grandson in presence of son—Nigar Jats, Jullundur tahsil.—Held, that by custom, among Nigar Jats of the Jullundur tahsil, the widow of the grandson is entitled to succeed for her lifetime or until remarriage equally with the son of a deceased proprietor.

... .. Ishar v. Mussammat Basanti—No. 19 P. R. 1911.

(5) *Custom—Succession*—Chundawand or Pagwand—Sidhu Musalman Jats, mauza Pakhowali, tahsil Gurdaspur—Riwaj-i-am.—Held, that notwithstanding the entry in the *Riwaj-i-am* of the Gurdaspur district in favour of the Chundawand rule, the *onus probandi* that this rule exists among Sidhu Musalman Jats of mauza Pakhowali, tahsil Gurdaspur, is on the person asserting it, and that he had failed to prove it.

... .. No. 58 P. R. 1911.

CUSTOM (WIDOW'S ESTATE).

*Custom—widow's estate—*forfeiture of, on marrying deceased husband's brother—Sikh Jats, mauza Butaheri, tahsil and district Ludhiana—Riwaj-i-am.—Held, that among Sikh Jats of mauza Butaheri, tahsil and district Ludhiana, a widow does not forfeit her life estate in her deceased husband's property on marrying her husband's brother.

... .. No. 51 P. R. 1911.

CUSTOM (WILL).

*Custom—will of self-acquired property in favour of some sons to exclusion of another son—*validity of, among Arain agriculturists of tahsil Kasur, Lahore district.—Riwaj-i-am—onus probandi.—Held, that plaintiff, on whom the *onus probandi* lay, had failed to prove that by custom his father, a Lahore Arain agriculturist, who had become dissatisfied with him and separated from him, giving him share of the family estate as it then stood, was incompetent to bequeath his remaining estate with its subsequent self-acquired accretions to his other sons.

... .. No. 66 P. R. 1911.

D

DAUGHTER.

(1) Among Naru Rajputs of the Phillour tahsil of district Jullundur, daughters do not succeed to the exclusion of the collaterals.

See *Custom (Succession)* (1).

... .. Khaire Khan v. Ghulam Ghaus—No. 32 P. R. 1911.

(2) Exclusion of daughter by *pattidars* is opposed to the general custom and entry in record of rights and *Riwaj-i-am* in favour of *pattidars* not sufficient.

See *Custom (Succession)* (2).

... .. Devi Singh v. Mussammat Premi—No. 11 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

DAUGHTER—*concl'd.*

(3) Gift of ancestral land in favour of daughter valid to extent of one-twentieth among Tarkhans of Sialkot district.

See *Custom (Alienation)* (3).

... .. *Rahim Bakhsh v. Natha*—No. 23 P. R. 1911.

(4) Daughter succeeds under Hindu Law in preference to collaterals in fourth degree.

See *Custom (Alienation)* (2).

... .. No. 43 P. R. 1911.

(5) Of donees of land, succeed in preference to reversioners of donor.

See *Custom (Succession)* (3).

... .. No. 68 P. R. 1911.

(6) Gift by sonless proprietor of part of his ancestral land in favour of his daughter, whose husband is the donor's *ghar jawai*, is valid by custom among Arains of *manza* Dholewala, *tahsil* Zira, district Ferozepore.

See *Custom (Alienation)* (10).

... .. *Karm Din v. Mussamat Jio*—No. 13 P. R. 1911.

DAUGHTER'S SON.

(1) Oral gift of ancestral land, followed by mutation, in favour of his daughter's son is valid by custom among Kalan Jats of *tahsil* Shakargarh, district Gurdaspur.

See *Custom (Alienation)* (12).

... .. *Harnam Singh v. Lachman Singh*—No. 16 P. R. 1911.

(2) Adoption of—Muhammadian Jats, Garhshankar *tahsil*—presumption against validity of.

See *Custom (Adoption)* (3).

... .. No. 44 P. R. 1911.

DEATH

Of respondents—plea of ignorance till after expiry of limitation, does not justify departure from order XXII, rule 4 (3), Civil Procedure Code.

See *Appeal* (2).

... .. No. 60 P. R. 1911.

DECREE OR ORDER.

(1) *Decree or order*—*Order refusing to entertain a plea*—*Civil Procedure Code, Act V of 1908, section 2, clauses (2) and (14)*—*right of appeal*.—The purchaser of the equity of redemption sued the mortgagee for a perpetual injunction to restrain the latter from effecting certain repairs.

The references are to the Nos. given to the cases in the "Record."

DECREE OR ORDER—*contd.*

One of the pleas of the defendant was that he held a mortgage from a co-owner in the mortgaged property, from whom he had a separate mortgage empowering him to effect the repairs. The District Judge held that he was in law debarred from going into the question of the rights of a co-owner, and refused to go into them. The defendant thereon preferred an appeal to the Divisional Judge from the order of the District Judge on this point. The Divisional Judge held that the order amounted to a preliminary decree and was consequently appealable.

Held, that the order of the District Judge was not a preliminary decree but merely an order as defined in section 2 (14) of the Code of Civil Procedure and that no appeal lay therefrom to the Divisional Judge.

... .. *Kanshi Nath v. Nathu Ram—No. 41 P. R. 1911.*

(2) *Decree (preliminary)—meaning of—Civil Procedure Code, Act V of 1908, section 2 (2)—appeal—revision.—Held*, that in the definition of "decree" in section 2 (2) of the Civil Procedure Code of 1908 the words "rights of the parties" must be taken to be the rights of the parties *inter se* in regard to the subject matter of the suit and that preliminary orders passed upon :—

(a) an objection, as to part of the suit, based upon the terms of the Pension Act ;

(b) a question as to how that portion of the claim dealing with profits is to be determined ;

(c) a demand by defendant that security should be taken from plaintiff before the case proceeds further ; and

(d) an allegation by the defendant that the total Court-fee stamp now required from plaintiff is largely deficient ;

are consequently not decrees and not appealable.

Held also, that as an appeal will lie from the decree in the suit, the Court must decline to interfere with the orders on revision.

146 P. R. 1908 distinguished.

... .. *No. 82 P. R. 1911.*

(3) *Preliminary decree—Civil Procedure Code, Act V of 1908, section 2 (2)—order returning plaint for amendment—appeal—revision—declaratory decree in respect of right to realise birt—parohit and jujmans—Specific Relief Act, I of 1877, sections 40 and 54.—Where the first Court passed the following order :—"Plaintiffs cannot bring a suit for "declaration of birt and should bring a suit for "injunction" and added—"order announced to Counsel of parties and plaintiff's counsel are directed to comply with the order till 14th "August 1909, for which date the case is postponed."*

Held, that this was merely an order returning the plaint for amendment within a specified period and not a preliminary decree within the meaning of section 2 (2), Civil Procedure Code, and that consequently no appeal was competent under the provisions of the Code.

Held also, that although the order was only interlocutory, the very peculiar circumstances of the case justified the Chief Court in dealing with it on the revision side.

The references are to the Nos. given to the cases in the "Record."

DECREE OR ORDER—concl'd.

Held also, that plaintiff's claim to a decree declaratory of their so-called right as heirs of one Buta to realize *birt* could not be recognized by a Civil Court, the so-called right not being *property* within the meaning and for the purpose of section 42 of the Specific Relief Act, 1877.

[The relations between a *parohit* and his *jujmans* discussed.]

8 P. R. 1901 differed from, and

7 P. R. 1877, *Strimathoo Mootho v. Darasinga Tevar*, (1875) 15 B. L. R. 108 (P. C.), *Samarindra Chandra Deb v. Birendra K. Deb*, (1908) I. L. R. 35 Cal. 789—794 and 115 P. R. 1883, referred to.

Held further, that the objections to the grant of a declaratory decree are equally fatal to the grant of an injunction, in the absence of a specific agreement between the parties (*vide* section 54, Specific Relief Act).

Rajavalad Shivapa v. Krishnabhat, (1879) I. L. R. 3 Bom. 232 and *Daya Ram Hargovan v. Jetha Bhat Lakhmiram*, (1896) I. L. R. 20 Bom. 784, referred to.

... .. No. 96 P. R. 1911.

DECLARATORY SUIT.

Declaratory suit, to effect that plaintiff is the real decree-holder of a decree obtained by defendant—Court fees—Consequential relief—Specific Relief Act, I of 1877, section 42.—Held, that in a suit for a declaration that plaintiff is the real holder of a decree obtained by defendants against a third party and praying also that the decree be transferred to the plaintiff, the latter prayer is mere surplusage and may be disregarded—the result being that no consequential relief has been sought in the plaint and a ten-rupee Court-fee stamp is adequate.

Held also, that it is for the lower Court to decide whether the plaintiff could seek further reliefs which would bring the proviso to section 42 of the Specific Relief Act, 1877, into operation.

... .. *Ganeshi Lal v. Beni Prashad*—No. 1 P. R. 1911.

DIRECTOR OF COMPANY.

Acts done *bonâ fide* by director, not properly appointed—validity of.

See *Companies*.

... .. No. 46 P. R. 1911.

DIVORCE.

(1) *Divorce—when petitioner has himself been guilty of adultery—Indian Divorce Act, IV of 1869, section 14.—Held*, that where the petitioner has during the marriage been guilty of adultery, the Court has discretion to pass a decree, in spite of such adultery (*vide* section 14 of the Indian Divorce Act, 1869) and that the Courts are bound by the rules which bind the English Courts under the English Divorce Act.

The references are to the Nos. given to the cases in the "Record."

DIVORCE—concl'd.

Held also, following *Wyke v. Wyke* (L. R. 1904, *Probate* 149), that adultery by the petitioner is, except under very peculiar circumstances, a bar to a decree, but that the circumstances in this case were of a nature to justify the passing of a decree.

... .. No. 70 P. R. 1911.

(2) *Divorce—Petition by husband against wife who had a child 330 days after date of last access—proof of adultery—legitimacy of child—Indian Evidence Act, I of 1872, section 112.*—Where the husband prayed for a divorce from his wife on the sole ground that the latter had given birth to a child 333 days after last co-habitation between them and the Court found that she had done so 330 days after the last co-habitation and that there was no evidence at all to prove immorality on the part of the wife, or adultery with any particular person—

Held, that there being no inherent impossibility of gestation of 330 or 333 days after co-habitation, this fact alone, though suspicious, was not conclusive as to the wife's adultery, and that the child must be held to be legitimate having regard to section 112 of the Evidence Act.

... .. No. 77 P. R. 1911.

(3) *Divorce—Jurisdiction of Chief Court, both parties residing within its jurisdiction, though not together—Indian Divorce Act, IV of 1869, section 3 (1).*—*Held*, that the Chief Court, Punjab, has jurisdiction to entertain a petition for divorce filed by a petitioner who last resided with her husband within the jurisdiction of the Bombay Court and at the date of filing the petition resided within the jurisdiction of the Chief Court, the respondent also residing at that date within the jurisdiction of that Court, though apart from the petitioner.

... .. No. 47 P. R. 1911 (F. B.).

DIVORCE ACT.

See *Indian Divorce Act*.

E

EVIDENCE.

(1) Admissibility of evidence of conduct of parties subsequent to contract.

See *Indian Evidence Act* (2).

... .. *Bulaki Mal v. Mr. C. J. Floyd*—No. 27 P. R. 1911.

(2) In pre-emption cases—value of proof of uncontested instances and instances in neighbourhood.

See *Custom (Pre-emption)* (2).

... .. No. 78 P. R. 1911.

(3) What evidence required to prove adoption.

See *Custom (Adoption)* (2).

... .. No. 42 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

EVIDENCE ACT.

See *Indian Evidence Act*.

EXCHANGE OF LAND.

Widow in possession of her deceased husband's land is not authorized by custom to effect an exchange of land without necessity.

See *Custom (Alienation)* (9).

... .. *Mussammat Nihali v. Lehna*—No. 2 P. R. 1911.

F

FORM OF SUIT.

Suit not bad because relief, prayed for, does not affect each defendant equally.

See *Companies*.

... .. No. 46 P. R. 1911.

FRAUD.

Pre-emptor not bound by fraudulent overstatement of sale price in a suit by reversioners to have sale set aside.

See *Pre-emption* (9).

... .. No. 83 P. R. 1911.

G

GIFT.

(1) Daughter of donee of land succeeds in preference to reversioner of donor.

See *Custom (Succession)* (3).

... .. No. 68 P. R. 1911.

(2) to daughters in presence of collaterals in fifth degree, Muhammadan Jats—Mianwali district.

See *Custom (Alienation)* (13).

... .. No. 72 P. R. 1911.

(3) Gift by sonless proprietor of part of his ancestral land to his daughter, whose husband is the donor's *ghar jawai*—Arains of mauza Dholewala, *tahsil* Zira, district Ferozepore.

See *Custom (Alienation)* (10).

... .. *Karm Din v. Mussammat Jio*—No. 13 P. R. 1911.

(4) Oral gift of ancestral land, followed by mutation, by sonless proprietor in favour of his daughter's son, whose father remained in the donor's house since his marriage, is valid among Kalan Jats of *tahsil* Shakargarh, district Gurdaspur.

See *Custom (Alienation)* (12).

... .. *Harnam Singh v. Lachman Singh*—No. 16 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

GIFT—*concl'd.*

(5) to Hindu female—construction of—

See *Hindu Law* (3).

... .. No. 61 P. R. 1911.

(6) Validity of—in favour of daughter to extent of one-twentieth among Tarkhans of Sialkot district.

See *Custom (Alienation)* (3).

... .. No. 23 P. R. 1911.

GRANDSON.

Held, that by custom among Nigar Jats of the Jullundur *tahsil*, the widow of the grandson is entitled to succeed for the life time or until remarriage equally with the son of a deceased proprietor.

... .. No. 19 P. R. 1911.

H

HAQIYAT.

Meaning of—

See *Amendment of Decree*.

... .. No. 24 P. R. 1911.

HINDU LAW.

(1) Brahmans of *mauza* Dharmsala, *tahsil* Una, district Hoshiarpur, are not governed by Hindu Law in matters of succession.

See *Custom (Alienation)* (4).

... .. No. 34 P. R. 1911.

(2) Collaterals in 4th degree do not exclude daughters by Hindu Law.

See *Custom (Alienation)* (2).

... .. No. 43 P. R. 1911.

(3) *Hindu Law—gift to Hindu female—interpretation of deed of gift.*—*Held*, following *Suraj Mani v. Rabi Nath Ojha*, (1908) I. L. R. 30 All. 84 (P.C.) that a deed in favour of a Hindu female has to be interpreted in the same way as any other deed, and that if the wording of the deed, taken as a whole, points to an intention to confer full ownership, the full ownership is conveyed, just as if the beneficiary was a man.

Held also, that the *dictum* of their Lordships of the Privy Council must be taken as rendering obsolete the main principle on which the ruling in 27 P. R. 1889 was based.

... .. No. 61 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

HINDU LAW—*contd.*

(4) Marriage between a Jhabra Rajput and a Tarkhan woman—validity of.

See *Custom (Marriage)*.

... .. No. 65 P. R. 1911.

(5) *Hindu Law—Joint family—suit by managing members for recovery of a debt, without impleading the other members—Court-fee on appeal, where only question is to whom the amount, admittedly due, is payable—Court-fees Act, VII of 1870, schedule II, article 17 VI.*—Plaintiffs, 2 members of a joint Hindu family, sued defendant for recovery of Rs. 17,000 principal and Rs. 5,585 interest due on a bond in which the above plaintiffs alone were named as obligers—defendant admitted execution of the bond and liability thereunder but pleaded that the money was due to all the members of the joint family and also that he paid the other members of the family Rs. 10,400 on account. The first Court held that the other members of the joint family were not necessary parties and payments made to them need not be accounted for by plaintiffs and decreed whole amount claimed—defendant appealed to the Chief Court on a Rs. 10 Court-fees stamp alleging that the value for purposes of Court-fee could not be determined.

Held, that as regards the claim to have the decree of the first Court reduced by the payments amounting to Rs. 10,400, the appellant must pay *ad valorem* duty but as regards the claim for a declaration as to who was entitled to receive the balance due, *i.e.*, the plaintiffs only or all the members of the family, a Rs. 10 stamp was sufficient under article 17 VI, schedule II, Court-fees Act.

Held also, following *Kishen Parshad v. Har Narain Singh* [(1910-11) 15 Cal. W. N. 321 P. C.] that the plaintiffs suing merely on behalf of the family as the alleged managing members of one of the family shops were entitled to bring the suit in their name without making the other members of the family parties to the suit.

Held also on the same authority, that if a contract is made on behalf of a joint Hindu family by the managing members no other member of the family is competent to interfere in that contract or to give receipts in connection therewith.

Held, however, that as defendant in this case was under the impression that he had contracted with all the members of the family and had no notice or reason to believe otherwise, plaintiffs must give credit for the amounts paid to the other members of the family on account.

... .. No. 71 P. R. 1911.

(6) Result of adoption among Bhabra Jains of Kaithal is, that adopted son becomes co-parcener with adoptive father in joint family property and adoptive father cannot bequeath any part of it in presence of adopted son.

See *Custom (Adoption)* (1).

... .. No. 74 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

HINDU LAW—*concl'd.*

(7) Sodhi Khatris of *mauza* Thathi Khara, Tarn Taran *tahsil* of the Amritsar district, are governed by Hindu Law in matters of alienation.

See *Custom (Alienation)* (7).

... .. No. 23 P. R. 1911.

HOONDEES—

Silent as to interest—what interest chargeable.

See *Interest*.

... .. No. 52 P. R. 1911.

I

INDIAN COMPANIES ACT, 1882.

(1) SECTION 92.

Acts of Director or Manager, not properly appointed.

See *Companies*.

... .. No. 46 P. R. 1911.

(2) SECTION 151.

Liability of contributories in regard to unpaid calls made *before* winding up.

See *Companies (in liquidation)*.

... .. No. 67 P. R. 1911.

INDIAN CONTRACT ACT—

(1) SECTION 25.

Mortgage by minor, after attaining majority, for consideration received during minority—validity of—

See *Minor*.

... .. No. 31 P. R. 1911.

(2) SECTION 45.

When one of several lessees can sue for possession of the whole land leased.

See *Joint Contract*.

... .. No. 57 P. R. 1911

INDIAN DIVORCE ACT, 1869.

(1) SECTION 3 (1).

Chief Court has jurisdiction where parties reside in Punjab, but not together.

See *Divorce* (3).

... .. No. 47 P. R. 1911 (F. B.).

The references are to the Nos. given to the cases in the "Record."

INDIAN DIVORCE ACT, 1869—*concl'd.*

(2) SECTION 14.

Discretionary power of Court to grant divorce even though petitioner has himself been guilty of adultery.

See *Divorce* (1).

... .. No. 70 P. R. 1911.

INDIAN EVIDENCE ACT.

(1) SECTION 92.

Separate *oral* agreement to pay interest on hondees, silent as to interest inadmissible.

See *Interest*.

... .. No. 52 P. R. 1911.

(2) *Sections 92 and 94—Admissibility of evidence of conduct of parties subsequent to contract.*—*Held* that, although under section 92 of the Evidence Act, no evidence of any oral agreement or statement can be admitted as between the parties to a contract in writing for the purpose of contradicting varying, adding to or subtracting from its terms, evidence of the conduct of the parties subsequent to the execution of the document is admissible—

(1) as it may serve to show what the real meaning of the contract was, and

(2) as it may operate as an estoppel when it amounts to part performance of the contract.

Held also, (a) that on the evidence produced in this case the defendant had succeeded in showing that the real contract was different from that set out in the Pro-note sued upon and was as alleged by defendant; and (b) that as the plaintiff had never set defendant right about the terms of the contract as understood by the defendant, the plaintiff was now estopped from setting up different terms.

... .. No. 27 P. R. 1911.

(3) SECTION 112.

Legitimacy of child, born 330 days after date of last access.

See *Divorce* (2).

... .. No. 77 P. R. 1911.

INDIAN LIMITATION ACT, 1877.

(1) *Section 14—"Defect of jurisdiction or other cause of a like nature"*—*Not applicable to defect "in form of suit."*—*Held*, that section 14 of the Indian Limitation Act, 1877, does not apply to a case in which a plaint was found to be bad by reason of misjoinder of causes of action and of parties and was returned for amendment. *And* that the words in section 14 "is presented in good faith in a Court which from the defect of jurisdic-

The references are to the Nos. given to the cases in the "Record."

INDIAN LIMITATION ACT, 1877—*concl'd.*

"tion or other cause of a like nature is unable to entertain it" cannot be extended to cases in which a Court can entertain a suit, but is unable to pass a decree by reason of defect in the form of a suit.

34 P. R. 1898 (*Raja of Faridkote v. Sirdar Gurdial Singh*), *Narayanan Chetty v. Kannammai Achi*, (1905) I. L. R. 28 Mad. 338 and *India Publishers, Limited v. Aldridge*, (1908) I. L. R. 35 Cal. 728 (F. B.) followed—*Mathura Singh v. Bhawani Singh*, (1900) I. L. R. 22 All. 248 (F. B.) dissented from.

... .. No. 8 P. R. 1911.

(2) ARTICLE 141.

Governs suit by reversioners for possession of land, mortgaged by male owner more than 12 years before suit and subsequently sold by his widow.

See *Limitation* (6).

... .. No. 33 P. R. 1911 (F.B.).

(3) *Schedule II, Articles 113 and 144.*—*Held*, that a suit for possession of part of land, purchased by plaintiff from defendant, but not delivered when the rest of the land purchased was delivered, is not governed by Article 113 of the Limitation Act but by Article 144 of the Act—

... .. No. 18 P. R. 1911.

(4) ARTICLES 118 AND 144.

Suits for possession in which adoption is set up in defence, governed by article 144 and not article 118.

See *Custom (Adoption)* (3).

... .. No. 44 P. R. 1911.

INDIAN LIMITATION ACT, 1908.

(1) *Section 2 (8), schedule II, articles 140, 141, 142 and 144*—*Adverse possession*—*Alienation by widow, not challenged by nearest reversioner.*—*Suit for possession by remote reversioner after death of nearest reversioner.*—The last male owner of agricultural land died leaving a widow, who died in 1876, and a mother, who died in 1892. The widow had alienated part of the land and had placed the alienee in possession. The alienation was not for necessity. The nearest reversioner B great-grand son of K., the great grandfather of the last male owner, died in 1903, without challenging the alienation or expressly assenting to it. The descendants of the brother of K. sued in 1909 the heirs of the alienee for possession of the land alienated. The question submitted to the Full Bench was whether plaintiffs' suit was within time.

Held, following the principles underlying 18 P. R. 1895 (F. B.) and dissenting from 106 P. R. 1906, that the claim was not barred under article 144 of the Limitation Act, 1908, inasmuch as the plaintiffs'

The references are to the Nos. given to the cases in the "Record."

INDIAN LIMITATION ACT, 1908—*contd.*

right to sue for possession was not derived from or through B (*vide* definition of "plaintiff" in section 2 (8) of the Act), and consequently the defendants' possession, though adverse to B., could not be adverse to the plaintiffs until after his death, when their right to possession accrued.

Held also, that articles 140 and 141 had no application to the case.

... .. No. 26 P.R. 1911 (F. B.).

(2) SECTION 3.

How Courts should treat belated pleas of limitation and when the Lower Appellate Court is justified in not entertaining the plea.

See Pre-emption (10).

... .. No. 84 P. R. 1911.

(3) SECTION 18.

Fraudulent concealment of actual vendee—deed in favour of a benamidar—suit against actual vendee within period of limitation from date when actual vendee became known.—Plaintiff sued M. S. for pre-emption on the 2nd March 1908 (the 1st being a holiday) in respect of a sale in favour of B. L. by registered deed, dated 26th November 1906, which appeared from the mutation proceedings held on 1st March 1907 to have been *benami* for M. S., the real purchaser, whose name had been fraudulently concealed from plaintiff until then.

Held, that section 18 of the Limitation Act applied, the suit being against the person guilty of the fraud, that it was immaterial that a possibly infructuous suit against the ostensible purchaser might have been instituted before the fraud became known to the plaintiff and that consequently the suit was within limitation.

... .. No. 89 P. R. 1911.

(4) SECTION 22.

Where previous to suit for pre-emption the vendee has resold the land to another person who is not made a party till after expiry of limitation, the suit is barred.

See Pre-emption (10)

... .. No. 84 P. R. 1911.

(5) ARTICLES 118 AND 144.

Suits for possession in which adoption is set up in defence, governed by article 144 and not article 118.

See Custom (Adoption) (3).

... .. No. 44 P. R. 1191

The references are to the Nos. given to the cases in the "Record."

INDIAN LIMITATION ACT, 1908—*concl'd.*

(7) ARTICLE 144.

Adverse possession—Where on partition of land a particular field allotted to B remains in possession of A.

See *Limitation* (1).

... .. No. 81 P. R. 1911.

INDIAN RAILWAYS ACT.

SECTION 42 (2).

Held, that the provisions of section 42 (2) as to preference apply only to traffic facilities and not to persons seeing friends off.

See *Platform Ticket*.

... .. No. 36 P. R. 1911.

INSOLVENCY—

(1) *Insolvency*—order under section 25, *Punjab Laws Act, IV of 1872*—appeal—revision under section 70 (1) (b), *Punjab Courts Act, XVIII of 1884*—concealment of account books—order under section 26, *Punjab Laws Act*, not open to revision.—*Held*, that no appeal lies from an order by the Judge of the Insolvency Court under section 25, *Punjab Laws Act*.

65 P. R. 1882, 33 P. R. 1883 and 62 P. R. 1886, followed.

Held also, that no revision lies from such an order under section 70 (1) (b), *Punjab Courts Act*, inasmuch as it is not a decree.

70 P. R. 1904 and 65 P. R. 1905, followed.

Held also, that section 25, *Punjab Laws Act*, is not limited to conduct in contracting debts but includes *inter alia* concealment of account books which is gross misconduct in reference to debts.

Held further, that where a transfer has been annulled as fraudulent under section 26, *Punjab Laws Act*, the alleged transferee cannot apply to the Chief Court on the revision side instead of filing a suit.

... .. No. 64 P. R. 1911.

(2) *Insolvency*—appeal from order under section 25, *Punjab Laws Act, IV of 1872*—proper time for order of discharge, section 29 *ibid.*—*Held*, that no appeal lies from an order under section 25, *Punjab Laws Act*, unless the order amounts to a decree—62 P. R. 1886, followed.

Held also, that no definite finding or order as to an insolvent's right to discharge should be made until the administration of the estate has been completed (*vide* section 29 *ibid.*).

... .. No. 85 P. R. 1911.

INSTITUTION OF SUIT.

Date of, not affected by a remand order directing retrial *de novo*.

See *Provincial Small Cause Courts Act* (3).

... .. No. 94 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

INTEREST.

Interest—Hoondees silent as to interest—separate oral agreement inadmissible—Evidence Act, I of 1872, section 92—Negotiable Instruments Act, XXVI of 1881, section 80.—Plaintiffs sued defendant for the recovery of the principal amounts due upon several *hoondees* together with interest due thereon at the rate of Re. 1-4-0 per cent. per mensem, alleging that, although the instruments were silent as to interest, the latter was recoverable under a separate oral agreement.

Held, that evidence as to the separate oral agreement was inadmissible under section 92 of the Evidence Act, proviso 2 to the section not being applicable to the case, and that interest could only be allowed at the rate of Rs. 6 per cent. *per annum* under section 80 of the Negotiable Instruments Act.

... .. No. 52 P. R. 1911.

J

JATS.

Adoption of daughter's son, invalid.

See *Custom (Adoption)* (3).

... .. No. 44 P. R. 1911

JOINT CONTRACT.

Joint contract—suit by 2 out of several lessees for possession of the whole land leased—maintainability of such suit—Indian Contract Act, IX of 1872, section 45.—Where the 2 plaintiffs together with 9 other persons (impleaded as defendants) had jointly entered into a lease of certain land with the defendants-lessors, and sued for possession of the land leased, the other lessees having refused to join in the suit and being in fact in collusion with the defendants-lessors—

Held, that the 2 plaintiffs were not only entitled, but indeed obliged, to sue for possession of the whole of the land leased.

... .. No. 57 P. R. 1911.

JOINT FAMILY.

Suit by managing member for recovery of debt—payments on account made to other members.

See *Hindu Law* (5).

... .. No. 71 P. R. 1911.

JOINT MORTGAGE.

Joint mortgage—redemption of share of one of the mortgagors, when admissible—Qn. whether the mortgagor should first sue for partition.—Where plaintiff as one of the *khewatdars* sued to redeem the whole land originally mortgaged by its sole owner Fazla, which in 1869 (after Fazla's death without leaving heirs) became *shamilat-i-deh*—

The references are to the Nos. given to the cases in the "Record."

JOINT MORTGAGOR—*concl'd.*

Held that, though the mortgage was originally indivisible, it ceased to retain its indivisible character when in 1869 the mortgagee as a *khewatdar* became part-owner of the equity of redemption and accepted that position, and that consequently each co-sharer could redeem his share separately, but not the whole.

Held also, that it was not necessary for plaintiff to have the *shamilat* partitioned before he could redeem his share of the mortgage.

... .. No. 62 P. R. 1911.

JURISDICTION (CIVIL OR REVENUE COURT).

(1) *Jurisdiction—Civil or Revenue Court—suit for declaration that plaintiffs (Malikan Kabza) are not liable to pay Bakri and Thana patti dues—there being no custom under which they are payable—Punjab Tenancy Act, XVI of 1887, section 77 (3) (j).—Held, following 33 P. R. 1908 (F.B.) that a suit brought by Malikan Kabza and non-proprietary residents of a village and owners of the houses occupied by them for a declaration that they were not liable to pay Bakri and Thana patti dues, there being no custom as to the realization of such dues in their district or village, is not cognizable by a Civil Court.*

67 P. R. 1905, distinguished.

... .. No. 79 I. R. 1911.

(2) *Jurisdiction—Civil Revenue Court—Suit for value of a tree—Punjab Tenancy Act, XVI of 1887, section 77 (3) (k).—Held, that where the plaint and plaintiff's statement show that the plaintiff sues for the whole value of a tree as its sole owner, the Civil Court has jurisdiction to try the suit, although the evidence produced by the parties may show that the tree stood on land which was the joint property of the parties—a suit of this description does not fall within section 77 (3) (k) of the Punjab Tenancy Act, XVI of 1887.*

52 P. R. 1910, distinguished.

... .. No. 10 P. R. 1911.

JURISDICTION.

(1) Of Chief Court in matrimonial cases where parties reside in Punjab but not together.

See *Divorce* (3).

... .. No. 47 P. R. 1911 (F. B.).

(2) *Held, that when a Divisional Judge refrained from passing a definite order on an application for revision made by the Deputy Commissioner under section 21 (A) (2) of the Punjab Alienation of Land Act he had full jurisdiction to pass another order upon a second application made by the Deputy Commissioner.*

See *Punjab Alienation of Land Act*.

... .. No. 12 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

K

KHANADAMAD.

(1) *Held*, that among *Arains* of *mauza* Dholewala, *tahsil* Zira, district Ferozepore a sonless proprietor has by custom the power to make a gift of a portion of his ancestral land in favour of his daughter, whose husband is the donor's *khanadamad*.

See *Custom (Alienation)* (10).

... .. No. 13 P. R. 1911.

(2) Oral gift of ancestral land followed by mutation by sonless proprietor in favour of his daughter's sons, whose father lived in the donor's house since the date of marriage is valid by custom among Kalon Jats of *tahsil* Shakargarh, district Gurdaspur.

See *Custom (Alienation)* (3).

... .. No. 16 P. R. 1911.

KHATRIS.

(1) Presumption is against their following agricultural custom.

See *Custom (Alienation)* (2).

... .. No. 43 P. R. 1911.

(2) Sodhi Khatri of *mauza* Thathi Khara, *tahsil* Tarn Taran, district Amritsar, are governed by Hindu Law in matters of alienation.

See *Custom (Alienation)* (7).

... .. No. 28 P. R. 1911.

KURESHIS

Of Sialkot city—alienations not controllable by reversionary heirs.

See *Custom (Alienation)* (14).

... .. No. 63 P. R. 1911.

L

LAND.

Held, that the word "Land" as defined in section 2 (3) of the Punjab Alienation of Land Act, includes mortgage rights in land.

See *Punjab Alienation of Land Act*.

... .. No. 12 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

LANDLORD AND TENANT.

Landlord and tenant—suit in ejectment—notice to quit specified in lease—denial of landlord's title by defendant before suit.—Held, that in a suit by a landlord for ejectment of a tenant no notice of determination of tenancy is necessary, where the defendant has prior to the suit being brought, denied the plaintiff's title as landlord and the validity of the lease, notwithstanding that the lease specifies such notice.

Haidri Begum v. Nathu, (1895) *I. L. R.* 17 *All.* 45, followed.

... .. No. 76 *P. R.* 1911.

LEASE.

(1) Suit for ejectment of tenant maintainable without notice of determination of tenancy when tenant has denied landlord's title.

See Landlord and Tenant.

... .. No. 76 *P. R.* 1911.

(2) In favour of several lessees—when enforceable at instance of one of the lessees.

See Joint Contract.

... .. No. 57 *P. R.* 1911.

LIMITATION.

(1) *Limitation—suit for land, which fell to plaintiff's share on partition—adverse possession—Punjab Land Revenue Act, XVII of 1887, section 122.—Held, that when partition of land takes place and a particular field allotted to B. remains in possession of A., the latter holds adverse possession from date of partition. B. can during the first 3 years apply to the Revenue Court under section 122, Punjab Land Revenue Act to be put in possession and during the following 9 years sue for possession in a Civil Court.*

... .. No. 81 *P. R.* 1911.

(2) Where not pleaded and the decision would involve further enquiry into facts, the Lower Appellate Court justified in refusing to go into it.

See Pre-emption (10).

... .. No. 84 *P. R.* 1911.

(3) In pre-emption suits where vendee has previous to suit resold to another person, who is not made a party till after expiry of period of limitation.

See Pre-emption (10).

... .. No. 84 *P. R.* 1911.

The references are to the Nos. given to the cases in the "Record."

LIMITATION—*contd.*

(4) Belated pleas of—how to be treated by Courts.

See *Pre-emption* (10).

... .. No. 84 P. R. 1911.

(5) In pre-emption suit against actual vendee whose name had been fraudulently concealed.

See *Indian Limitation Act* (4).

... .. No. 89 P. R. 1911.

(6) *Limitation—Suit by reversioners for possession of land mortgaged by male owner more than twelve years before suit and subsequently sold by his widow—merger of mortgage in sale—Punjab Limitation Act, I of 1900—Indian Limitation Act, XV of 1877, Article 141.*—On 2nd December 1886 R. K. mortgaged to T. 28 *bighas* of land by way of simple mortgage, the mortgagor retaining possession. R. K. died about 1887. On 7th November 1899 his widow sold the said land and some other land in addition to the said T. for Rs. 2,000 (part of which (Rs. 1,200) consisted of the sum due under the prior mortgage made by R. K.) and delivered possession. On 7th December 1899, T. sold the said land to K. R. R. K.'s widow died about the end of 1901, and on 2nd October 1903 the plaintiff, a reversioner of R. K., brought the present suit for possession against the vendee and his alienee.

Held by the Full Bench, that inasmuch as the defendants' mortgage from R. K. gave them no right to possession and they had obtained possession solely by virtue of the sale in their favour by R. K.'s widow, the suit was governed by the provisions of article 141 of the second schedule of the Indian Limitation Act, 1877, and not by the Punjab Limitation Act, 1900, and was consequently not barred by limitation.

Held also, that the mortgage by R. K. did not merge in the sale by the widow, and as a suit for a declaration that such mortgage was void except for the lifetime of R. K. would long since have been barred under Article 1 of the Schedule to the Punjab Limitation Act, 1900, the plaintiff was also debarred from challenging it in this suit.

... .. No. 33 P. R. 1911 (F. B.)

(7) *Limitation—Suit for possession of part of land purchased, but not delivered with the rest—Indian Limitation Act, XV of 1877, Schedule II, articles 113 and 144.*—*Held*, that a suit for possession of part of land purchased by plaintiff from defendant, but not delivered when the rest of the land purchased was delivered, is not governed by article 113 of the Limitation Act but by article 144 of the Act.

... .. No. 18 P. R. 1911

(8) For suits for possession, in which adoption is set up in defence, governed by article 144, Limitation Act, and not article 118.

See *Custom (Adoption)* (3).

... .. No. 44 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

LIMITATION—concl'd.

(9) *Limitation—Suit for possession within twelve years from date of mutation, but more than twelve years from date defendant got possession—Punjab Limitation Act, I of 1900, article 2.*—On 9th March 1908 plaintiff, as heir of his deceased father, sued defendants for possession of certain land of his father's in their possession, defendants pleaded that the plaintiff's father had mortgaged the land by deed, dated 16th June 1893, and that the mortgagee had sold his rights to them on the 25th January 1898. There had been no mutation in respect of the mortgage except one after the sale, attested on the 18th August 1898, although the mortgagee and defendants had been in possession since 1893.

Held, that as there had been a mutation of names attested within twelve years of suit, the suit was not barred by article 2 of the Punjab Limitation Act I of 1900, notwithstanding the long possession of the mortgagee.

... .. No. 48 P. R. 1911.

LIMITATION ACT.

See *Indian Limitation Act*.

LIQUIDATION (COMPANIES).

Liability of contributories, in regard to unpaid calls made before winding up.

See *Companies (in liquidation)*.

... .. No. 67 P. R. 1911.

LIS PENDENS.

(1) *Lis pendens—pre-emption—exchange of land during pendency of suit to pre-emptor having superior rights, after expiry of period of limitation.*—*Held*, that the doctrine of *lis pendens* applies to an exchange of land made during the pendency of a suit for pre-emption, in favour of a person who had a superior right to pre-empt but who had not enforced that right and whose right to sue had become barred by lapse of time before the land was exchanged.

26 P. R. 1908 distinguished.

... .. No. 30 P. R. 1911.

(2) Doctrine of, not applicable to re-sale to another pre-emptor during pendency of a pre-emption suit.

See *Pre-emption* (5).

... .. No. 53 P. R. 1911.

M

MADARIS.

Madaris (jugglers) of Ludhiana District, are bound by agricultural custom.

See *Custom (Alienation)* (1).

... .. No. 7 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

MARRIAGE

(1) by widow, presumption of, after long co-habitation.

See *Custom (Marriage)*.

... .. No. 65 P. R. 1911.

(2) by Jhabra Rajputs and a Tarkhan woman—validity of.

See *Custom (Marriage)*.

... .. No. 65 P. R. 1911.

MAVESHİ.

Construction of word "maveshi" (cattle) in entry in Wajib-ul-arz concerning grazing rights in shamilat land.—Held, that the Lower Courts were right in restricting the word maveshi (cattle), used in an entry in the Wajib-ul-arz, conferring grazing rights on non-occupancy tenants and other residents of the village over shamilat land, to cattle used for agricultural and domestic purposes and excluding sheep and goats kept for trading purposes.

... .. No. 86 P. R. 1911.

MERGER.

Suit for possession of land mortgaged by male owner more than twelve years before suit and subsequently sold by his widow—merger of mortgage in sale.

See *Limitation (6)*.

... .. No. 33 P. R. 1911 (F. B.).

MINOR.

Minor—Mortgage by—after attaining majority, for consideration received during minority—Validity of—Indian Contract Act, IX of 1872, section 25 (2)—Rule laid down in 59 P. R. 1907 (F. B.) as to necessity of full consideration for a mortgage, explained.—Held, that it is not open to a mortgagor who had to his own knowledge received the whole of the money which is the actual consideration for the contract and had to receive nothing more, to plead subsequently that the mortgage was incomplete and void simply because the deed of mortgage recited more consideration than was actually paid. The rule laid down in No. 59 P. R. 1907 (F. B.) (Gokal Chand v. Rahman) is not applicable to such a case, the consideration for the mortgage relating not to a future payment but to an alleged payment in the past.

Held also, that although it was now settled law that a promise by an infant is a mere nullity and void, yet an agreement made by a person of full age to compensate wholly or in part a promisor who had already voluntarily done something for the promisor, even at a time when the promisor was a minor, did fall within the terms of section 25, clause (2) of the Indian Contract Act, 1872, and conse-

The references are to the Nos. given to the cases in the "Record."

MINOR—*concl'd.*

quently a mortgage made for this purpose was binding on the representatives in interest of the mortgagor, but merely to the extent of compensating the mortgagee for monies and articles actually supplied to the mortgagor during his minority as well as after he came of age.

Indram Rama Swami v. Authappa, (1906) 16 *Mad. L. J.* 422, differed from.

... .. No. 31 *P. R.* 1911.

MORTGAGE.

(1) Mortgage of land acquired by a female, subject to Punjab Custom, is not ancestral land.

See *Custom (Alienation)* (8).

... .. No. 29 *P. R.* 1911.

(2) by minor, after attaining majority, for consideration received during minority—validity of—

See *Minor*.

... .. No. 31 *P. R.* 1911.

(3) Made jointly by several mortgagors—losing its indivisible character on mortgagee becoming part owner of equity of redemption, thus enabling each mortgagor to redeem his share separately—previous partition not necessary.

See *Joint Mortgage*.

... .. No. 62 *P. R.* 1911.

(4) *Mortgage—only in part for necessity—mortgagee not entitled to possession of fraction of mortgaged property.*—The mortgagees of one Mussammatt Akki sued the defendant reversioners of this widow for possession of the mortgaged land. It was found that Rs. 228 out of Rs. 1,000 mortgage money was not for necessity.

Held, that a reversioner, against whom part only of the mortgage consideration is binding, is in the position of a mortgagor to whom part only of the consideration has passed and he can resist, on the ground of partial absence of consideration, the mortgagee's suit for possession.

Held, therefore, that the mortgagees in this suit were not entitled to possession of a fraction of the property mortgaged in proportion to the amount of mortgage money found to have been for necessity.

... .. No. 49 *P. R.* 1911.

(5) *Mortgage—simple usufructuary—sale of mortgaged property in execution of decree for instalments due—validity of—Transfer of property Act, IV of 1882, sections 67 and 99.*—Where a mortgage-deed of a house for Rs. 600 contained no condition for right of entry in default of payment and no undertaking to repay the principal, the sole conditions being for payment by the mortgagor of Rs. 45 per annum as rent for the occupation of the house and in default of payment of rent

The references are to the Nos. given to the cases in the "Record."

MORTGAGE—*concl'd.*

for one year, for payment of interest at 2 per cent. per mensem on the rent due and for recovery by the mortgagees of interest from year to year from the mortgaged property and from the other property of the mortgagor, and the mortgagee in 1897 sued and obtained a compromise decree for Rs. 200, recoverable first from the mortgaged property and then from the other property of the mortgagor, and in 1898 the mortgagees applied for execution of their decree by sale of the mortgaged property and on obtaining permission to bid at the sale purchased the property in 1899, and received possession in 1903 by a certificate signed by the mortgagor who remained in possession as tenant, and on refusal to vacate, the present suit for possession was filed by the mortgagees in 1909 and dismissed by both the Courts on the ground that the sale was void under section 99 of the Transfer of Property Act, 1882—

Held, by the Chief Court on further appeal—

(1) that the mortgage was a simple mortgage usufructuary as defined in Macpherson on Mortgages, ed. IV, p. 14 ;

(2) that the suit of 1897 was of the nature described in section 67 of the Transfer of Property Act as a suit for an order that the property mortgaged be sold, (the remedy prescribed for a simple mortgage) and clause (a) of the section was not applicable and did not bar the suit for sale ;

(3) that the rule contained in section 99 of the Act was inapplicable, the compromise decree having specifically provided for recovery of the amount due by sale ;

(4) that moreover section 99 of the Act had not been extended to the Punjab, and had been disapproved of as a legislative mistake by the select committee appointed to consider the amendment of the Code of Civil Procedure, and

(5) that the purchase by the mortgagees was consequently valid and conveyed a good title to them, entitling them to a decree for possession on the mortgagor declining to vacate and denying their title.

... .. No. 15 P. R. 1911.

MORTGAGE RIGHTS.

Held, that where a sale of mortgage rights in execution of a decree contravenes provisions of section 16 of the Punjab Alienation of Land Act, the mere fact that the right of receiving the mortgage money from the mortgagor personally was also included in the terms of the mortgage-deed will not validate the sale, which must stand or fall as a whole.

See Punjab Alienation of Land Act.

... .. No. 12 P. R. 1911.

MUHAMMADAN LAW.

(1) *Bukhari Sayyeds, tahsil Zira*, not governed by—in matters of alienation.

See Custom (Alienation) (6).

... .. No. 92 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

MUHAMMADAN LAW—*concl'd.*

(2) Kureshis—Sialkot City—alienation not controllable by reversionary heirs under customary law.

See *Custom (Alienation)* (14).

... .. No. 63 P. R. 1911.

(3) Applicability of—Sayads of Sialkot City.

See *Custom (Alienation)* (11).

... .. No. 14 P. R. 1911.

MUJAWARS—

Liability of—to dismissal—in a Muhammadan shrine, Attock District.

See *Religious Institutions*.

... .. No. 6 P. R. 1911.

MUNICIPALITIES.

Municipalities—Power given to, under Acts to be construed strictly—Notice under section 92 for demolition of a building cannot be applied to case falling under section 95 of the Punjab Municipal Act, X Xof 1891.—Held, that powers given to a Municipal Committee under Acts must be construed strictly and that consequently when a Municipal Committee issued notice upon the plaintiff for the demolition of a thara, apparently under section 92 of the Punjab Municipal Act and not under section 95, plaintiff was entitled to a declaration that the Committee had not the power to order the demolition of the thara in the absence of proof that it had been erected recently.

... .. No. 56 P. R. 1911.

N

NECESSITY.

(1) Widow in possession of her deceased husband's land cannot effect an exchange of land except for necessity.

See *Custom (Alienation)* (9).

... .. No. 2 P. R. 1911.

(2) Mortgage for possession, only in part for necessity, does not entitle mortgagee to possession of any of the mortgaged property.

See *Mortgage* (4).

... .. No. 49 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

NEGOTIABLE INSTRUMENTS ACT.

(1) SECTION 80.

Interest chargeable on *hundis*, silent as to interest.

See *Interest*.

... .. No. 52 P. R. 1911.

(2) SECTION 83.

Applicability of, to the ordinary *hundi* of the country payable after a certain number of days.

See *Bill of Exchange*.

... .. No. 39 P. R. 1911.

0

OCCUPANCY RIGHTS.

Occupancy rights—mortgage of—in favour of landlord—locus standi of reversioners to impugn the mortgage—Punjab Tenancy Act, XVI of 1887, sections 53 and 56.—Held, that the principles laid down in 24 P. R. 1902 (F. B.) apply also to mortgages and that a reversioner of an occupancy tenant cannot, therefore, impugn a mortgage of the occupancy rights made by the tenant in favour of his landlord.

31 P. R. 1896 (F. B.), 89 P. R. 1898 (F. B.), 65 P. R. 1900 (F. B.), and 24 P. R. 1902 (F. B.), referred to.

... .. No. 73 P. R. 1911.

ONUS PROBANDI

(1) that reversionary heirs can by custom control alienations by *Kureshis* of Sialkot City, is on the heirs.

See *Custom (Alienation)* (14).

... .. No. 63 P. R. 1911.

(2) As to Sodhi Khatri of *mouza* Thathi Khara, *tahsil* Tarn Taran, district Amritsar, following agricultural custom and not Hindu Law.

See *Custom (Alienation)* (7).

... .. No. 28 P. R. 1911.

(3) Entry in the record of rights and *riwaj-i-am* in favour of *pattidars*, unsupported by any instances, is not sufficient to discharge the onus of proving a preferential right to daughters.

See *Custom (Succession)* (2).

... .. No. 11 P. R. 1911.

See also *Burden of Proof*.

ORDER.

See *Decree or Order*.

The references are to the Nos. given to the cases in the "Record."

P

PAROHIT AND JIJMAN.

Relations between—discussed.

See *Decree* (3).

... ..

No. 96 P. R. 1911.

PATTIDARS.

Exclusion of daughters by *pattidars* is opposed to the general custom—and the *onus* of proving a special custom entitling them to exclude the daughter is on the *pattidars*.

See *Custom (Succession)* (2).

... ..

No. 11 P. R. 1911.

PLATFORM TICKET.

Platform ticket—persons seeing friends off—Preference—Indian Railways Act, IX of 1890, section 42, rule 29.—Held, that rule 29 of the rules framed under the Railways Act empowers a Railway Company to exclude from, or admit on certain conditions including payment for admission, to their platform persons who are not *bonâ fide* passengers and have not business on the Railway premises.

Held also, that a person who goes to a station merely to see a friend off is not one having *business* on the Railway premises within the meaning of that rule.

Held further, that the provisions of section 42 (2) as to preference apply only to traffic facilities, *i.e.*, to rolling stock and passengers, animals and goods, and not to persons seeing friends off.

... ..

No. 36 P. R. 1911

PRE-EMPTION.

(1) *Pre-emption*—agreement granting occupancy rights—Sale—Punjab Pre-emption Act, 1905, sections 3 (5) and 4.—Held, that an arrangement by which the proprietors of certain land granted occupancy rights to certain tenants on payment of a very trifling sum (the object of the arrangement being to induce the tenants to effect certain improvements in the land) is not a sale as contemplated by the Punjab Pre-emption Act, 1905, and cannot therefore be the subject of pre-emption.

136 P. R. 1907, followed.

... ..

No. 37 P. R. 1911.

(2) *Pre-emption*—Sale completed by execution of decree for specific performance of contract—not subject to pre-emption—Punjab Pre-emption Act, II of 1905, sections 3 (5) and 4.—In 1900 one J. sold certain lands to defendants 2 and 6. One of the owners of the land happened to be a minor and J. his uncle, as his *de facto* guardian agreed that if at any time the minor repudiated the sale, he (J) would give the vendees a like amount

The references are to the Nos. given to the cases in the "Record."

PRE-EMPTION—*contd.*

of land out of his own property. Subsequently the minor did repudiate the sale and recovered his share from the vendees by suit. Thereon the vendees sued J. for the land which he had agreed to give them in lieu of the minor's share. This claim was strenuously contested by J. but the vendees obtained a decree. The present plaintiffs who were the sons of J. sued for pre-emption of the land decreed to the vendees.

Held, that the vendees' suit against J. was in its essence one for specific performance of contract and the decree *per se* did not effect "a sale" of the land even though the price may have been previously paid. The sale (if it could be so-called) was not completed until the decree-holders executed the decree and so obtained possession of the land, and that it thus fell within the exception given in section 3 (5) of the Punjab Pre-emption Act, as a sale in execution of a decree and consequently no right of pre-emption arose in respect of it.

... .. No. 40 P. R. 1911.

(3) Exchange of land, during pendency of suit, to a pre-emptor having superior rights, after expiry of period of limitation—application of doctrine of *lis pendens*—

Sec *Lis pendens* (1).

... .. No. 30 P. R. 1911.

(4) *Pre-emption—House property in Rawalpindi Cantonment—Punjab Pre-emption Act, II of 1905, section 7 (1) and 3 (3).*—*Held*, that notwithstanding Punjab Government Notification No. 677, dated 10th November 1908, declaring Rawalpindi City and Cantonment to be a town under section 3 (3) of the Punjab Pre-emption Act, 1905, a suit for pre-emption in regard to house property in the Cantonment is barred by the provisions of section 7 (1) of the Act.

... .. No. 9 P. R. 1911.

(5) *Pre-emption—lis pendens—resale of property to another pre-emptor during pendency of suit—rival pre-emptors sharing bargain—Punjab Pre-emption Act, section 14.*—*Held*, where after the institution of a suit for pre-emption another pre-emptor asserted his right of pre-emption privately and the vendee, in recognition of his right, transferred the property to him, that the doctrine of *lis pendens* did not apply to such transfer, and that the same would bar plaintiff's suit, unless plaintiff had superior rights of pre-emption to the transferee.

Held also, that section 14 of the Punjab Pre-emption Act had no application to such a case and that consequently the plaintiff was not entitled to share the property in suit with the transferee as a rival pre-emptor with equal rights of pre-emption.

... .. No. 53 P. R. 1911.

(6) *Pre-emption—consideration for sale made up of previous debts—option under proviso to section 22, Punjab Pre-emption Act, II of 1905, when to be granted.*—Where the consideration money for a sale, Rs. 1,200, was

The references are to the Nos. given to the cases in the "Record."

PRE-EMPTION—*contd.*

made up of previous debts and the market value of the property sold was found to be Rs. 780.

Held, that the *proviso* to section 22 of the Punjab Pre-emption Act was applicable and the amount payable by the pre-emptor must be the market value or the vendees may, at the discretion of the Court, be put to their option of either accepting such value or having the sale cancelled.

Held also, that as the vendees, appellants in this case, had not been able to show any equity in their favour, it was unnecessary for the Chief Court to allow the vendees any option in the matter and therefore the decree of the lower Appellate Court, decreeing the claim on payment of the market value, was confirmed.

... ..

No. 54 P. R. 1911.

(7) In Lahore City, mohalla Acharjan, Gumti Bazar.

See *Custom (Pre-emption)* (1).

... ..

No. 91 P. R. 1911.

(8) *Pre-emption—claimed by owner of adjacent shop—Punjab Pre-emption Act, II of 1905, section 13 (1) severthly—sale of half property in suit and agreement to sell other half not detrimental to pre-emptor's title to a decree.—Held*, that the words "immoveable property" in section 13 (1) *severthly* of the Punjab Pre-emption Act include a shop.

Held also, that the sale by the plaintiff pre-emptor of half the property in suit and an agreement to sell the other half, does not derogate from his right or disentitle him to a decree.

... ..

No. 80 P. R. 1911.

(9) *Pre-emption—fraudulent over-statement of sale price—how far binding on successful pre-emptor in suit by heirs of vendor, to have sale set aside for want of consideration and necessity—when actual price paid nearly approximates market value of property sold, Courts decline to change sale into mortgage.—A* sold certain land for Rs. 4,000. B sued for pre-emption alleging that the real price paid Rs. 3,000. The Court found that this was so and decreed the claim on payment of Rs. 3,240, the ascertained market value. The sons of A then sued for recovery of the land on the ground that the sale by their father was neither for consideration nor for necessity. The Lower Appellate Court held that B, the pre-emptor, stood in the shoes of the original vendee and must accept the fact that the sale was put down for a consideration of Rs. 4,000 and finding that only Rs. 3,000 was actually paid and for necessity decreed the claim on payment of that amount.

Held, that though a pre-emptor who obtains a decree becomes in many respects identified in interest with the original vendee, he cannot be held a *particeps criminis* in a fraud perpetrated by the vendee, which he himself brought to light and succeeded in frustrating and that B was not therefore debarred from urging in the present case that the sale, though ostensibly for Rs. 4,000, was in fact merely for Rs. 3,000.

The references are to the Nos. given to the cases in the "Record."

PRE-EMPTION—*concl'd.*

Held also, that as the sale was for Rs. 3,000 and that amount was for necessity and fairly represented the market value, there was no reason for converting the sale into a mere mortgage and that the suit must consequently be dismissed.

S P. R. 1908 and 27 P. R. 1909, referred to.

... .. No. 83 P. R. 1911.

(10) *Pre-emption—Limitation—where vendee has transferred bargain to another person who is not made a party till after expiry of period of limitation—when Appellate Court justified in declining to go into point of limitation—observations as to belated pleas of limitation.—Held* following 25 P. R. 1903, that where, previous to the institution of a suit for pre-emption, the vendee has resold the land to another person and the latter is not made a party to the suit until after the expiration of the period of limitation, the suit is barred.

Held also, where limitation has not been pleaded in the first Court nor taken in the grounds of appeal, but only in argument and the plea for its proper decision involved further enquiry into facts, the Appellate Court was justified in refusing to entertain it.

Observations as to how Courts should treat belated pleas of limitation.

Balaram v. Mangta Dass, (1907) I. L. R. 34 Cal. 941 (F. B.), *Ahmad Ali v. Waris Hussain*, (1893) I. L. R. 15 All. 123, *Dattu v. Kasai*, (1884) I. L. R. 8 Bom. 535 and *Venkata N. Naidu v. Bhashyakarlu Naidu*, (1902) I. L. R. 25 Mad. 367, referred to.

... .. No. 84 P. R. 1911.

(11) *Pre-emption—right to, of lineal descendant who is also a co-sharer—pre-emptor and vendee, having equal rights, share bargain—Punjab Pre-emption Act, II of 1905, sections 12 and 14.—Held*, that the fact that a pre-emptor is both a lineal descendant and a co-sharer does not give him superior rights to another lineal descendant of equal degree who is not a co-sharer; *vide* section 12, Punjab Pre-emption Act.

Held also, that where the pre-emptor and the vendee have equal rights to pre-emption the pre-emptor is entitled to one-half of the property sold and the vendee to the other half—*vide* section 14 *ibid*.

... .. No. 87 P. R. 1911.

(12) In respect of *benami* sale, suit against actual vendee, whose name had been fraudulently concealed—limitation.

See *Indian Limitation Act* (4).

... .. No. 89 P. R. 1911.

(13) In bazar Baba Malak, Nakodar.

See *Custom (Pre-emption)* (3).

... .. No. 59 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

PRESUMPTION.

Held, that although the initial presumption in the case of non-agricultural Sayads, residents of a city, is that they follow Muhammadan law, yet where in defiance of that law widows take over the whole of their husbands' immoveable estate, a natural presumption arises that they do so as life-holders only, subject to control by male reversioners.

See *Custom (Alienation)* (11).

... .. No. 14 P. R. 1911.

PROVINCIAL INSOLVENCY ACT.

Section 46 (1)—Appeals in Punjab lie to Divisional Court.—Held, that under Punjab Home Department, Judicial Notification No. 889 of the 18th November 1908, appeals under section 46 (1) of the Provincial Insolvency Act, 1907, from orders made in exercise of insolvency jurisdiction by a Court subordinate to the Divisional Court lie to that Court.

... .. No. 3 P. R. 1911.

PROVINCIAL SMALL CAUSE COURTS ACT.

(1) SECTION 15.

See *Small Cause*.

... .. No. 20 P. R. 1911.

(2) *Section 25—wrong decision on point of limitation, when not interfered with on revision.—Held*, that the Chief Court will not in the exercise of its discretionary powers of revision under section 25 of the Provincial Small Cause Courts Act interfere with an erroneous decision on a point of limitation, where the judgment of the Lower Court does substantial justice between the parties.

66 P. R. 1904 and 19 P. R. 1901, referred to.

... .. No. 93 P. R. 1911.

(3) *Section 32 (2)—imperative—date of institution not affected by remand for retrial.—Held*, that the terms of section 32 (2), Provincial Small Cause Courts Act are imperative and apply to a suit instituted before the Court was invested with Small Cause Court jurisdiction, and that the date of institution is not affected by a remand order directing retrial *de novo* after the Court had been invested with such jurisdiction.

... .. No. 94 P. R. 1911.

PUNJAB ALIENATION OF LAND ACT.

Punjab Alienation of Land Act, XIII of 1900, sections 2 (3), 16 and 21 A (2)—definition of land—Mortgage rights in agricultural land—sale of—cancelled on application of Deputy Commissioner—Jurisdiction of Divisional Judge—Appeal—Revision—Punjab Courts Act, XVIII of 1884, section 40.—Held, that no appeal lies, as of right, to the Chief Court from an order passed by the Divisional Court upon an applica-

The references are to the Nos. given to the cases in the "Record."

PUNJAB ALIENATION OF LAND ACT—*concl'd.*

tion made by the Deputy Commissioner under section 21 A (2) of the Punjab Alienation of Land Act, 1900, for revision of the order of an executing Court sanctioning the sale of the judgment-debtor's mortgage rights in agricultural land to the decree-holder, the order though a decree, not being an *appellate* decree within the meaning of section 40 of the Punjab Courts Act.—But *held*, that the provisions of section 21 do not take away the right, which a party to a suit or an execution proceeding has, of applying to the Chief Court under the general provisions of section 70 of the Punjab Courts Act for revision of such an order.

Held also, that when a Divisional Judge refrained from passing a definite order on an application for revision made by the Deputy Commissioner under section 21 A (2) of the Punjab Alienation of Land Act, he had full jurisdiction to pass such an order upon a second application made by the Deputy Commissioner.

Held also, that the word "land" as defined in section 2 (3) of the Punjab Alienation of Land Act includes mortgage rights in land.

Held also, that where a sale of mortgage rights in execution of a decree contravenes provisions of section 16 of the Punjab Alienation of Land Act, the mere fact that the right of receiving the mortgage money from the mortgagor personally was also included in the terms of the mortgage-deed, will not validate the sale, which must stand or fall as a whole.

Held further, that when a sale of land belonging to a member of an agricultural tribe is made under order of a Civil Court in execution of a decree, the provisions of section 16 of the Alienation of Land Act are contravened and section 21 A of the Act applies.

6 P. R. (Rev.) 1903 approved.

... .. No. 12 P. R. 1911

PUNJAB COURTS ACT.

(1) SECTION 40.

Appeals from orders of remand when admissible.

See *Appeal* (8).

... .. No. 50 P. R. 1911.

(2) SECTION 40.

Appeal to Chief Court, where Lower Appellate Court decreed Rs. 3,000 compensation.—Plaintiff claimed to be part owner of a site in which the defendants were building a mosque and sued for an injunction to stop the building—both the Lower Courts found that as the building was practically completed plaintiff was only entitled to compensation, the first Court fixing the amount at Rs. 100 and the Divisional Judge on appeal at Rs. 3,000.

The references are to the Nos. given to the cases in the "Record."

PUNJAB COURTS ACT—*concl'd.*

Held, that on the principle laid down in 24 P. R. 1903 (F. B.) the decree involved a question regarding property of Rs. 3,000 in value and a further appeal to the Chief Court was therefore competent.

... .. No. 90 P. R. 1911.

(3) SECTION 70.

Revision from orders of Lower Court in regard to Court-fees, &c., not being preliminary decrees, declined.

See *Decree or Order* (2).

... .. No. 82 P. R. 1911.

(4) SECTION 70 (1) (b).

An order under section 26, Punjab Laws Act, annulling a transfer as fraudulent is not open to revision by Chief Court.

See *Insolvency* (1).

... .. No. 64 P. R. 1911.

(5) SECTION 70 (1) (a) AND (b).

See *Small Cause*.

... .. No. 20 P. R. 1911.

(6) *Held*, that the provisions of section 21 of the Punjab Alienation of Land Act do not take away the right which a party to suit or an execution proceeding has of applying to the Chief Court under the general provisions of section 70 of the Punjab Courts Act for revision of an order passed by the Divisional Court upon an application made by the Deputy Commissioner under section 21 A (2) of the Punjab Alienation of Land Act.

See *Punjab Alienation of Land Act*.

... .. No. 12 P. R. 1911.

(7) *Punjab Courts Act, XVIII of 1884, [section 70 (1) (a)—Chief Court's power of revision—Erroneous decision by Appellate Court as to jurisdiction of first Court.—Held*, that an appellate judgment deciding, though erroneously, that the Court of first instance had jurisdiction to hear the suit, is not open to revision by the Chief Court under section 70 (1) (a) of the Punjab Courts Act, the Lower Appellate Court having had jurisdiction to entertain and decide the appeal.

46 P. R. 1886, followed.

... .. No. 4 P. R. 1911.

PUNJAB LAWS ACT, IV OF 1872.

(1) SECTION 25.

(a) No appeal lies from order under this section.

(b) Concealment of account books is gross misconduct in reference to debts.

See *Insolvency* (1).

... .. No. 64 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

PUNJAB LAWS ACT, IV OF 1872—*concl'd.*

(2) SECTION 25.

No appeal lies from order under—

See *Insolvency* (2).

... .. No. 85 P. R. 1911.

(3) SECTION 26.

Order annulling as fraudulent a transfer is not subject to revision by Chief Court.

See *Insolvency* (1).

... .. No. 64 P. R. 1911.

(4) SECTION 29.

No definite order as to insolvent's right to discharge should be made until administration of estate has been completed.

See *Insolvency* (2).

... .. No. 85 P. R. 1911.

PUNJAB LAND REVENUE ACT.

SECTION 122.

Where on partition of land a field allotted to B. remains in possession of A. the latter can sue within 3 years for its recovery in the Revenue Court and after that in Civil Court.

See *Limitation* (1).

... .. No. 81 P. R. 1911.

PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT, 1900.

(1) ARTICLE 2.

When mutation has taken place at any time, limitation starts from date of mutation and not from date of possession.

See *Limitation* (9).

... .. No. 48 P. R. 1911.

(2) Applicability of—to a suit by reversioners for possession of land mortgaged by male owner more than twelve years before suit and subsequently sold by his widow.

See *Limitation* (6).

... .. No. 33 P. R. 1911 (F. B.).

The references are to the Nos. given to the cases in the "Record."

PUNJAB MUNICIPAL ACT.

(1) SECTIONS 92 AND 95.

Notice under section 92 not sufficient for action under section 95—
Act must be construed strictly.

See Municipalities.

... .. No. 56 P. R. 1911.

(2) Refund of custom duty on goods being again exported—appeal
to Commissioner on refund being refused—suit for refund—rules by
Local Government.

See Custom Duty.

... .. No. 38 P. R. 1911.

PUNJAB PRE-EMPTION ACT.

(1) SECTIONS 3 (5) AND 4.

Agreement granting occupaney rights—sale.

See Pre-emption (1).

... .. No. 37 P. R. 1911.

(2) Sale completed by execution of decree for specific performance
of contract not subject to pre-emption.

See Pre-emption (2).

... .. No. 40 P. R. 1911.

(3) SECTION 6.

Custom of pre-emption not proved to exist in Baba Malak, Nakodar,
at time of commencement of Act.

See Custom (Pre-emption) (3).

... .. No. 59 P. R. 1911.

(4) SECTION 7 (1) AND 3 (3).

A suit for pre-emption in regard to house property in the Rawal-
pindi Cantonment is barred by the provisions of section 7 (1) of
the Act.

See Pre-emption (4).

... .. No. 9 P. R. 1911.

(5) SECTION 12.

A co-sharer who is also a lineal descendant has no advantage over
another co-sharer, who is not.

See Pre-emption (11).

... .. No. 87 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

PUNJAB PRE-EMPTION ACT—*concl'd.*

(6) SECTION 13 (2).

See *Custom (Pre-emption)* (4).

... .. No. 22 P. R. 1911.

(7) SECTION 13 (2) seventhly.

The words "immoveable property" include a shop.

See *Pre-emption* (8).

... .. No. 80 P. R. 1911.

(8) SECTION 14.

Has no application to a re-sale to another pre-emptor during pendency of a pre-emption suit.

See *Pre-emption* (5).

... .. No. 53 P. R. 1911.

(9) SECTION 14.

If pre-emptor and vendee have equal rights they share the bargain equally.

See *Pre-emption* (11).

... .. No. 87 P. R. 1911.

(10) SECTION 22. *Proviso.*

Option to take market value or have sale cancelled, when to be granted by Courts.

See *Pre-emption* (6).

... .. No. 54 P. R. 1911.

PUNJAB TENANCY ACT.

(1) SECTIONS 53 AND 56.

Mortgage by tenant in favour of landlord—*locus standi* of reversioners to impugn the same.

See *Occupancy Rights*.

... .. No. 73 P. R. 1911.

(2) SECTION 77 (3) (j).

Suit for declaration that plaintiffs are not liable to pay *Bakri* and *Thana patti* dues when cognizable by Revenue Court.

See *Jurisdiction (Civil or Revenue Court)* (1).

... .. No. 79 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

PUNJAB TENANCY ACT—*concl'd.*

(3) SECTION 77 (3) (k).

Not applicable to suit for value of a tree as its sole owner.

See *Jurisdiction (Civil or Revenue Court)* (2).

... .. No. 10 P. R. 1911.

R

RAILWAY ACT.

See *Indian Railways Act*.

RECORD OF RIGHT.

Entry in—unsupported by any instances—is not sufficient to discharge onus in case of succession dispute between *pattidars* and daughters.

See *Custom (Succession)* (2).

... .. No. 11 P. R. 1911.

See also *Riwaj-i-am*.

REDEMPTION.

By one of several mortgagors of his share of the mortgage, when admissible.

See *Joint Mortgage*.

... .. No. 62 P. R. 1911.

RELIGIOUS INSTITUTIONS.

Religious Institutions—liability of Mujawars in a Muhammadan shrine, Attock District, to dismissal.—Held, that the rule laid down in 154 P. R. 1889, that Mujawars in shrines, generally in the Peshawar District, are servants liable to dismissal, applies equally to Mujawars in shrines in the adjacent district of Attock, and that long service and the fact that the Mujawars have built houses in the neighbourhood of the shrine, do not deprive the heads of the shrine of the right to dismiss Mujawars, though the latter may be entitled to compensation on ejectment.

... .. No. 6 P. R. 1911.

REMAND ORDER.

When appealable under order XLIII, rule 1 (u), of Civil Procedure Code, 1908.

See *Appeal* (8).

... .. No. 50 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

REVISION.

(1) Not entertained from orders in regard to Court-fees, &c., which are not decrees.

See *Decree or Order* (2).

... .. No. 82 P. R. 1911.

(2) Erroneous decision on point of limitation, not interfered with on revision under section 25, Small Cause Courts Act, if substantial justice has been done.

See *Provincial Small Cause Courts Act* (2).

... .. No. 93 P. R. 1911.

(3) Allowed against order returning plaint for amendment.

See *Decree or Order* (3).

... .. No. 96 P. R. 1911.

(4) Mere misinterpretation of documents or error in law is no ground for interference on revision under section 70 (1) (a), Courts Act.

See *Small Cause*.

... .. No. 20 P. R. 1911.

(5) Revision lies from an order passed by the Divisional Court upon an application made by the Deputy Commissioner under section 21 A (2) of the Punjab Alienation of Land Act for cancellation of the sale of mortgage rights of judgment-debtor sold by the Civil Court in execution of a decree.

See *Punjab Alienation of Land Act*.

... .. No. 12 P. R. 1911.

(6) Erroneous decision by Appellate Court, as to jurisdiction of first Court, not open to revision under section 70 (i) (a) of Courts Act.

See *Punjab Courts Act* (7).

... .. No. 4 P. R. 1911.

RIWAJ-I-AM.

(1) Gurdaspur District—entry in favour of *chundawand* succession, not sufficient to shift *onus probandi* to other side.

See *Custom (Succession)* (5).

... .. No. 58 P. R. 1911.

(2) Lahore District—as to wills in favour of some sons to exclusion of another son previously separated and given his share.

See *Custom (Will)*.

... .. No. 66 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

RIWAJ-I-AM—concl'd.

(3) Discussion as to relative value of *Riwaj-i-am* of Sialkot District of 1865 and of that of 1892.

See *Custom (Alienation)* (3).

... .. No. 23 P. R. 1911.

(4) Entry in—unsupported by any instances—is not sufficient to discharge *onus* in case of succession dispute between *pattidars* and daughters.

See *Custom (Succession)* (2).

... .. No. 11 P. R. 1911.

(5) Mere entry in—not supported by instances—not sufficient to rebut presumption against validity of adoption of daughter's son among Jats.

See *Custom (Adoption)* (3).

... .. No. 44 P. R. 1911.

(6) Proof of Custom—*Riwaj-i-am* supported by instances.

See *Custom (Alienation)* (12).

... .. No. 16 P. R. 1911.

(7) Value of entries in new and old *Riwaj-i-am*.

See *Custom (Alienation)* (13).

... .. No. 72 P. R. 1911.

S

SALE—

(1) Of property in execution not admissible, unless conditions laid down in section 26, Civil Procedure Code, have been strictly complied with.

See *Civil Procedure Code*, 1882, (3).

... .. No. 69 P. R. 1911.

(2) Agreement granting occupancy right, not a sale, for purposes of pre-emption.

See *Pre-emption* (1).

... .. No. 37 P. R. 1911.

(3) Sale completed by execution of decree for specific performance of contract, not subject to pre-emption.

See *Pre-emption* (2).

... .. No. 40 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

SALE—*concl'd.*

(4) *Sale—non-payment of consideration—intention of parties whether sale shall be complete without payment of consideration or not—relevancy of subsequent conduct of parties in ascertaining their intention.*—Held that, although title in property sold can pass without payment of consideration, no title will pass where there is proof of an intention in both the parties that ownership should not pass until payment of consideration, and the subsequent conduct of the parties to the sale is relevant in order to show whether the parties intended ownership to pass independently of the payment of consideration or not.

... .. No. 55 P. R. 1911.

SALE IN EXECUTION OF DECREE.

(1) Sale of mortgage rights in agricultural land, in execution of decree, cancelled on application of Deputy Commissioner.

See Punjab Alienation of Land Act.

... .. No. 12 P. R. 1911.

(2) Sale of mortgaged property, in execution of decree for instalments due—validity of—

See Mortgage.

... .. No. 15 P. R. 1911..

SAYYEDS.

(Bukhari), *tahsil* Zira, governed by custom.

See Custom (Alienation) (6).

... .. No. 92 P. R. 1911.

SHAREHOLDERS.

(1) Cannot sue in name of Company without express consent of majority at meeting of shareholders.

See Companies.

... .. No. 46 P. R. 1911.

(2) Cannot bring questions of internal management of a Company before a Court of law.

See Companies.

... .. No. 46 P. R. 1911.

(3) Chairman of meeting of—not liable to damages for giving wrong decision on a matter before him at meeting.

See Companies.

... .. No. 46 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

SODHIS (KHATRIS).

Presumption is against their following agricultural custom.

See *Custom (Alienation)* (2).

... .. No. 43 P. R. 1911.

SMALL CAUSE.

Suit for a share in offerings, Darbar Sahib, Tarn Taran—Provincial Small Cause Courts Act, IX of 1887, section 15—Revision—Punjab Courts Act, section 70 (1) (a) and (b).—Plaintiff sued on the allegation that S. S., a *pujari* of Darbar Sahib at Tarn Taran, had died, leaving *inter alia* a share in the *charhuwa* (offerings) and in the income of a *jagir* attached to the Darbar Sahib, that the plaintiff was the adopted son and heir of the deceased, that defendant No. 1 was the manager of the Darbar Sahib who had collected the offerings and income, that defendant No. 2 was the brother of the deceased who claimed to be his heir, and that the share of profits and income amounted to Rs. 800 up to date of suit. The first Court decreed Rs. 657-6-10 against defendant No. 1 which decree was upheld by the Divisional Court on appeal—

Held, that the suit was in the nature of small cause and as the value of it was less than Rs. 1,000 no appeal lay under section 70 (1) (b) of the Punjab Courts Act.

Held also, that the lower Appellate Court had not ignored or placed a perversely erroneous interpretation upon any evidence cited, and that a mere misinterpretation of documents or error in law was no ground for interference on revision under section 70 (1) (a).

... .. No. 20 P. R. 1911.

SPECIFIC RELIEF ACT.

(1) SECTIONS 42 AND 54.

Neither suit for declaration nor for injunction can be entertained in respect of a so-called right to realize *birt* as *Parohit* from *Jujmans*.

See *Decree or Order* (3).

... .. No. 96 P. R. 1911.

(2) Section 42—Consequential relief—suit for declaration that plaintiff is real owner of a decree obtained by defendants.

See *Declaratory Suit*.

... .. No. 1 P. R. 1911.

(3) Section 21, last clause—*Suit based on agreement containing a clause for reference to arbitration—not barred unless defendant proves that plaintiff refused to submit to arbitration.*—In a suit based on a registered agreement containing a clause "If any dispute arises between th

The references are to the Nos. given to the cases in the "Record."

SPECIFIC RELIEF ACT—*concl'd.*

"parties regarding this agreement it shall be settled by master N. B.....and his decision shall be binding on the parties." Defendant raised a plea that the suit is barred by section 21 of the Specific Relief Act.

Held, that the defendant, on whom the *onus* lay, had failed to prove that plaintiffs had refused to perform the contract to refer the matter to arbitration before the present suit was instituted, and that consequently the last clause of section 21 of the Specific Relief Act did not operate as a bar to the plaintiffs' suit.

... .. No. 25 P. R. 1911.

STEP-SON.

Adoption of—not valid among Arains, Jullundur City.

See *Custom (Adoption)* (4).

... .. No. 45 P. R. 1911.

T

TESTAMENTARY CAPACITY

of the testator—*onus* of proving.

See *Will* (3).

... .. No. 21 P. R. 1911 (P. C.).

TRANSFER OF PROPERTY ACT.

SECTIONS 67 AND 99.

Applicability of—to cases of simple usufructuary mortgages in the Punjab.

See *Mortgage* (6).

... .. No. 15 P. R. 1911.

U

UNDUE INFLUENCE.

Evidence of—

See *Will* (3).

... .. No. 21 P. R. 1911 (P. C.).

The references are to the Nos. given to the cases in the "Record."

V

VALUATION OF SUIT.

For purposes of appeal.

Where the Appellate Court decreed compensation of Rs. 3,000 to plaintiffs, decree involves property of that value and further appeal lies.

See *Punjab Courts Act* (2).

... .. No. 90 P. R. 1911.

W

WAJIB-UL-AZZ.

See *Record of Rights*.

WIDOW.

(1) Exchange of land by widow—necessity.

See *Custom (Alienation)* (9).

... .. No. 2 P. R. 1911.

(2) Widow's right to alienate—Sayads of Sialkot City.

See *Custom (Alienation)* (11).

... .. No. 14 P. R. 1911.

(3) Widow of grandson succeeds equally with the son of a deceased proprietor among Nigar Jats, Jullundur tahsil.

See *Custom (Succession)* (4).

... .. No. 19 P. R. 1911.

WIDOW'S ESTATE.

Forfeiture of, on remarriage with deceased husband's brother—Sikh Jats, Ludhiana tahsil.

See *Custom (Widow's Estate)*.

... .. No. 51 P. R. 1911.

WILL.

(1) Incompetency of Hindu adoptive father to bequeath any part of the family property after adopting son.

See *Custom (Adoption)* (1).

... .. No. 74 P. R. 1911.

The references are to the Nos. given to the cases in the "Record."

WILL—concl'd.

(2) Of self-acquired property in favour of some sons to exclusion of another who was previously separated by his father—*Arains, Kasur tahsil.*

See *Custom (Will)*.

... .. No. 66 P. R. 1911.

(3) *Will—execution of—Testamentary capacity—Testator's illness—Undue influence—Evidence—Burden of proof.—Held*, that the *onus* of proving the testamentary capacity of the testator lies on those by whom the will is propounded.

Held also, that when the evidence produced is found to have discharged that *onus*, such evidence is not displaced by mere proof of serious illness and of general intemperance of the testator.

Held further, that circumstances of the character that there was motive and opportunity for the exercise of undue influence by the relative who attended the testator at the time of his illness, and that some of them benefitted by the will to the exclusion of other relatives of equal or nearer degree, sometimes suggest suspicion and would lead the Court to scrutinise with special care the evidence of those who propounded the will, but in order to set the will aside, there must be clear evidence that undue influence was, in fact, exercised or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property.

... .. No. 21 P. R. 1911 (P. C.).

WOMAN'S PROPERTY.

Gift to Hindu female—construction of.

See *Hindu Law* (3).

... .. No. 61 P. R. 1911.

Chief Court of the Punjab.

CIVIL JUDGMENTS

No. 1.

*Before Hon. Mr. Justice Shah Din and Hon. Mr.
Justice Chevis.*

GANESHI LAL AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

BENI PERSHAD AND OTHERS—(DEFENDANTS)—RE-
SPONDENTS.

Civil Appeal No. 616 of 1908.

Declaratory suit to effect that plaintiff is the real decree-holder of a decree obtained by defendant—Court-fees—Consequential relief—Specific Relief Act, I of 1877, section 42.

Held, that in a suit for a declaration that plaintiff is the real holder of a decree obtained by defendants against a third party and praying also that the decree be transferred to the plaintiff, the latter prayer is mere surplusage and may be disregarded—the result being that no consequential relief has been sought in the plaint and a ten-rupee Court-fee stamp is adequate.

Held also, that it is for the lower Court to decide whether the plaintiff could seek further reliefs which would bring the proviso to section 42 of the Specific Relief Act, 1877, into operation.

First appeal from the order of Hafiz Muhammad Yusaf, District Judge, Karnal, dated the 21st April 1908, returning plaint for amendment.

Dawarka Das, for appellants

Shadi Lal, for respondents.

The judgment of the Court was delivered by—

CHEVIS, J.—The plaintiffs allege that they sent Rs. 6,000 to 25th Nov. 1910. Beni Pershad and Jagan Nath, who were to acquire for them land from Shib Narain Singh, that the acquisition of the land fell through, but that Beni Pershad and Jagan Nath sued Shib Narain Singh and got a decree against him for money advanced, that that decree has not been executed, and plaintiffs now seek a declaration that they are the real decree-holders, and that the decree should be transferred to them. The suit was brought on a Rs. 10 stamp. The Lower Court holds that consequential

relief has been claimed, and that the plaint must be amended, that plaintiffs must state clearly the amount to which they consider themselves to be entitled and must explain their case more fully; and that if plaintiffs consider themselves entitled to the entire decretal amount, they must state the reasons.

The first question for decision is whether the plaint should be regarded as one seeking for further relief than a mere declaratory decree. For the plaintiffs who are appellants in this case, it is urged that no further relief has been sought, and *Shrimant Saga Jirao v. Smith* ⁽¹⁾, *Gour Mohun Gouli v. Dina Nath Karmokar* ⁽²⁾ and *Zinnatunnessa Khatun v. Girindra Nath Mukerjee* ⁽³⁾ are quoted. For respondents *Raj Narain Das v. Shama Nando Das* ⁽⁴⁾ is relied on, but in this ruling the question was not whether further relief *had* been sought, but whether further relief *could* be sought. Here the plaint has been returned on the ground that further relief *has* been sought. In *Raj Narain Das v. Shama Nando Das* ⁽⁴⁾ it is clear that no further relief had been sought; the suit was dismissed on the ground that further relief could be, and had not been, sought, and that plaintiffs were debarred by proviso to section 42 of the Specific Relief Act from obtaining a mere declaratory decree.

In *Shrimant Saga Jirao v. Smith* ⁽¹⁾ the only prayer in the plaint was that a certain decree should be declared null and void; this was held to be a claim for a declaratory decree without consequential relief.

Gour Mohun Gouli v. Dina Nath Karmokar ⁽²⁾ is only quoted with reference to certain remarks in the last paragraph on page 51, and is irrelevant so far as the question before us is concerned, which is not whether further relief can be sought, but whether further relief has been sought. The same may be said as regards certain remarks in the first paragraph of page 53 of the same ruling as to the results of a decree for a declaration being obtained.

In *Zinnatunnessa Khatun v. Girindra Nath Mukerjee* ⁽³⁾ it was held that a suit in which the only prayer was for a declaration that a certain decree was ineffectual and inoperative against the plaintiffs was a suit for a declaratory decree without consequential relief. The learned Judge (Maclean, C. J.) remarks, "The safest course in these cases is to ascertain what the plaintiff actually asks for by his plaint, and not to speculate upon what may be the ulterior effect of his success."

⁽¹⁾ (1896) I. L. R. 20 Bom. 736.

⁽²⁾ (1898) I. L. R. 25 Cal. 49.

⁽³⁾ (1903) I. L. R. 30 Cal. 768.

⁽⁴⁾ (1899) I. L. R. 26 Cal. 645.

In the present case the plaintiffs ask for a decree declaring them to be the real owners of the decree obtained by Beni Pershad and Jagan Nath and for the decree to be transferred to them. The latter part of this prayer appears to us to be mere surplusage. A somewhat similar case is when a person in possession of land seeks for a declaration that a mutation recorded in favour of another person by the Revenue Courts shall not have any effect against him ; in such cases the plaint often contains a superfluous and unnecessary prayer that the entry should be corrected, which prayer may be disregarded as surplusage.

Following *Shrimant Saga Jirao v. Smith* (1) and *Zinnatunnessa v. Girindra Nath Mukerjee* (2) we hold that the present suit is one in which no consequential relief has been sought, and has rightly been brought on a Rs. 10 stamp.

As to the other respects in which the Lower Court has directed the plaint to be amended, we note that the plaint is perfectly clear. Plaintiffs claim to be the real owners of the whole decree, and the District Judge should adjudicate on that claim and not direct the plaintiffs to reduce their claim. The Courts must adjudicate on claims as brought and cannot direct the parties to alter their claims. As to requiring the plaintiffs to explain their claim, it appears to us that the plaint contains all necessary particulars, and that any further explanations would be mere arguments which would be only out of place in the plaint. We hold, therefore, that the plaint has wrongly been returned for amendment, and we accept this appeal and direct the District Judge to receive the plaint again and to proceed with the case.

We note that it is still for the District Judge to decide whether the suit, as lodged, cannot succeed by reason of the proviso to section 42 of the Specific Relief Act ; on this part of the case we express no opinion, though some of the rulings above cited may perhaps throw light on the question. All that we decide at present is, that no further relief than a mere declaration has been sought. If the learned District Judge should arrive at a finding that further relief can be sought, the above-mentioned proviso must, of course, be regarded as a bar to a decree for a declaration. Whether in that case a further opportunity of amending the plaint should be offered, it will be for the District Judge to decide, but if such an opportunity is offered and

(1) (1896) I. L. R. 20 Bom. 736.

(2) (1903) I. L. R. 30 Cal. 788.

refused, the District Judge will, of course, have to dismiss the suit.

Stamp on appeal will be refunded ; other costs in this Court will follow the event.

Appeal accepted.

— — —
No. 2.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

**MUSSAMMAT NIHALI AND OTHERS—(DEFENDANTS)—
APPELLANTS,**

Versus

LEHNA AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 376 of 1910.

Custom—Alienation—Exchange by widow—Necessity.

Held, that a widow, in possession of her deceased husband's land, is not authorised by custom to effect an exchange of land except for necessity.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 16th December 1909.

Dawarka Das, for appellants.

Miran Bakhsh, for respondents.

The judgment of the Court was delivered by—

25th Nov 1910.

CHEVIS, J.—Mussammat Nihali is widow of Raja Ram, and holds his land on the usual life-tenure. She exchanged 2 *bighas* 1 *biswa* of the land with defendants Nos. 2 and 3 and then mortgaged the land taken in exchange together with some other land to defendant No. 4. The collaterals sue for a declaration that the exchange shall not affect their reversionary rights.. It may be noted that the exchange alone is attacked in the present suit, and not the mortgage. The First Court dismissed the suit, but the learned Divisional Judge on appeal held that the widow could not exchange the land except for necessity, and that no such necessity had been proved. The widow and the alienee appeal.

For the appellants it is urged that there is no law or custom preventing a widow from effecting an exchange, if thereby she improves the estate and increases the income, and also that the former income from the land, was insufficient to support her. It is argued that the exchange was effected in order to get together in one block a quantity of land sufficient for a brick-

kiln, that the block was then leased for a kiln, and that the estate has been improved thereby. It may be remarked that the so called mortgage is really a lease for twenty years for Rs. 800; at the end of that period the land is to be restored without repayment. It is also urged that the customary prohibition against alienations by a widow only applies to cases of sale and mortgage and not to cases of exchange, but no authority in support of this argument is quoted, and, in our opinion, it is necessity alone which can justify any sort of alienation by a widow. We are aware of no authority to the effect that a widow can make exchanges even for improvement. She is bound to preserve the estate, and it appears to us that to allow the proposition that she can effect exchanges for the mere purpose of improving it or getting a larger income from it, would be to open the door to all sorts of rash speculations and enterprises which might prove highly injurious or inconvenient to the reversioners.

For instance, a widow, residing in her parents' village, might conceivably exchange her husband's land for land in the village of her parents, the exchange might suit her convenience, and the estate might yield a larger income than before, but it would be unreasonable to force the reversioners to take over, on the death of the widow, land which, though yielding a larger income, was situated a great distance from their own village. No doubt cases might occur in which the exchange would ultimately suit the convenience of the reversioners and benefit them in every way, as for instance, the exchange of an outlying piece of land for a piece of equal value adjoining the main portion of the estate, but usually in such cases of manifest advantage the consent of the reversioners could easily be obtained. Without such consent we are of opinion, that in no case can a widow effect an exchange except for necessity. In the present case it most certainly cannot be said to have been shown that the income prior to the exchange was insufficient to support the widow, and so we hold that no necessity for the exchange has been shown to exist. The exchange, therefore, cannot be held to be binding on the reversioners.

In the present case we further hold that it is not shown that the exchange is for the benefit of the estate. No doubt the widow profits by it at present, but whether the brick-making business will be profitable in the long run cannot be said. And even if the brick-making should turn out to be a success, the reversioners may well object to the conversion of agricultural land into a brick-kiln, for they may have no inclination to

become brick-makers or to let their land to others for the purpose of making bricks, and to submit them to the expense of refitting the land to its original use would be quite inequitable.

We uphold the decision of the learned Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

No. 3.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

MANSA—APPELLANT,

Versus

NATHU AND OTHERS—RESPONDENTS.

Civil Appeal No. 1084 of 1909.

Provincial Insolvency Act, III of 1907, section 46 (1)—Appeals in Punjab lie to Divisional Court.

Held, that under Punjab Home Department, Judicial Notification No. 889 of the 18th November 1908, appeals under section 46 (1) of the Provincial Insolvency Act, 1907, from orders made in exercise of insolvency jurisdiction by a Court subordinate to the Divisional Court lie to that Court.

Miscellaneous appeal under section 46 (2), Act III of 1907, from the order of the District Judge, Gurdaspur District, dated 23rd August 1910.

Ganga Ram, for appellant.

Rambhaj Datta, for respondents.

The judgment of the learned Judge was as follows :—

8th Nov. 1910.

SIR ARTHUR REID, C. J.—A preliminary objection, that the appeal lies to the Divisional Court, not to this Court, must be allowed.

Section 46 (1) of the Insolvency Act, III of 1907, gives an appeal to the District Court from any order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court, and Punjab Home Department, Judicial Notification No. 889 of the 18th November 1908, declares that the Divisional Court shall be deemed to be a District Court for the purposes of section 46 (1) of the Provincial Insolvency Act, III of 1907. Section 46 (1) is probably a mistake for section 46, as complications of a serious nature may arise from the limitation to section 46 (1) of the notification.

Be this as it may, the appellant felt himself aggrieved by an order made in the exercise of insolvency jurisdiction by

a Court subordinate to the Divisional Court, and the appeal lies under the notification to the Divisional Court. The objection is allowed and the memorandum of appeal is returned for presentation in the Divisional Court. Parties will bear their own costs of this Court, the contents of the notification being calculated to create misconception.

To this extent the appeal is dismissed.

No. 4.

Before Hon. Sir Arthur Reid, Kt. Chief Judge.

SARDAR ARUR SINGH—(DEFENDANT)—PETITIONER,

Versus

BUA DITTA—(PLAINTIFF)	} RESPONDENTS.
MUSSAMMAT GANGA DEVI--	
(DEFENDANT),	

Civil Revision No. 1650 of 1909.

Punjab Courts Act, XVIII of 1884, section 70 (1) (a)—Chief Court's power of revision—Erroneous decision by Appellate Court as to jurisdiction of first Court.

Held, that an appellate judgment deciding, though erroneously, that the Court of first instance had jurisdiction to hear the suit, is not open to revision by the Chief Court under section 70 (1) (a) of the Punjab Courts Act, the Lower Appellate Court having had jurisdiction to entertain and decide the appeal.

Daulat Ram v. Asa Ram (1) followed.

Petition under Section 70 (1) (a) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the decree of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated the 3rd May 1909.

Lal Chand, for petitioner.

Muhammad Shafi, Ganpat Rai and Duni Chand, for respondents.

The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—A preliminary objection, that *Daulat Ram v. Asa Ram* (1) is authority for holding that this Court cannot interfere with the decree of the lower appellate Court under section 70 (1) (a) of the Courts Act, has force. The only ground taken which can be held to be a ground under the sub-section is the first, that the suit is not maintainable and is not cognizable by Civil Courts, and the ruling cited is that an appellate judgment deciding, though erroneously, that the

23rd Nov. 1910.

(1) 46 P. R. 1886.

Court of first instance had jurisdiction to hear the suit is not open to revision by this Court.

The Court of first instance having decided the suit and passed a decree, an appeal lay to the lower appellate Court and the fact that the Court of first instance had not jurisdiction to entertain and decide the suit would not prevent the appeal lying. The lower appellate Court, therefore, had jurisdiction to entertain and decide the appeal and the ruling cited is directly in point.

The learned advocate for the petitioner has not been able to cite any authority overruling *Daulat Ram v. Asa Ram* (1). That case was decided after the decision of their Lordships of the Privy Council in *Amir Hassan Khan v. Shao Bakhsh Singh* (2), and with due regard to that decision. I see no reason for referring this application to a Full Bench and I follow *Daulat Ram v. Asa Ram* (1) which is on all fours with the facts of this case, with the exception that it dealt with an objection to the territorial jurisdiction of the Court of first instance. The principle involved is the same in both cases.

The application is dismissed with costs.

Revision rejected.

No. 5.

Before Hon. Sir Arthur Reid, Kt. Chief Judge.

BANWARI DAS—(DEFENDANT)—APPELLANT,

Versus

NATHU SHAH AND OTHERS,—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 394 of 1910.

Court Fees Act, VII of 1870, article 1, Schedule I—Court fees in appeals in redemption suits.

Where the first Court found that the amount payable on redemption was Rs. 670 and on appeal the lower appellate Court reduced this sum to Rs. 190 and the prayer on further appeal to the Chief Court was that this sum be increased to Rs. 1,190.

Held, that article 1, Schedule I, of the Court Fees Act applied, the Court fee being payable on the value of the subject-matter in dispute in the appeal, viz. Rs. 1,000.

Reference under Court Fees Act, 1870 (1) followed.

⁽¹⁾ 46 P. R. 1886.

⁽²⁾ (1884) I. L. R. 11 Cal. 6 P. C.
⁽³⁾ (1906) I. L. R. 29 Mad. 367.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 8th January 1910.

Dwarka Das for appellant.

Nemo for respondents.

The order of the learned Judge was as follows :—

SIR ARTHUR REID, C J.—The first question for decision 25th Nov. 1910. is whether the Court fee on the memorandum of appeal is adequate.

It is proportionate to the amount of the principal mortgage money.

The Court of first instance found that the amount payable on redemption was Rs. 670, including arrears of *chakota* (mesne profits or rent) due. On appeal the lower appellate Court reduced this sum to Rs. 190.

The prayer on appeal is, that this sum be increased to Rs. 1,190.

Kishen Chand v. Taj-ud-din (1) dealt with jurisdiction only, with reference to section 40 of the Courts Act, and did not deal with Court fees.

Reference under Court Fees Act, 1870, (2) is directly in point, and the rule laid down therein is that article 1, Schedule I of the Act applies, the Court fee being payable on the value of the subject-matter in dispute in the appeal.

The ruling follows *Nepal Rai v. Debi Prasad* (3), and I see no reason for differing.

The value of the subject-matter in dispute here is Rs. 1,000, i.e., the difference between Rs. 190 decreed by the lower appellate Court and Rs. 1,190 claimed.

The Court fee must consequently be made up to Rs. 75.

Admitted, Division Bench, subject to the Court fee being made up within 14 days of this date.

No. 6.

Before Hon. Sir Arthur Reid, Kt., Chief Judge

FAKIRA AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

MEHR SHAH AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 342 of 1910

Religious Institutions—Liability of Mujawars in a Muhammadan shrine, Attock District, to dismissal.

(1) 23 P. R. 1909.

(2) (1906) I. L. R. 29 Mad. 367.

(3) (1905) I. L. R. 27 All. 447.

Held, that the rule laid down in *Muhammad Tahir v. Najibulla* ⁽¹⁾ that *Mujawars* in shrines generally in the Peshawar District are servants liable to dismissal, applies equally to *Mujawars* in shrines in the adjacent district of Attock, and that long service and the fact that the *Mujawars* have built houses in the neighbourhood of the shrine, do not deprive the heads of the shrine of the right to dismiss *Mujawars*, though the latter may be entitled to compensation on ejectment.

Further appeal from the decree of E. A. Estcourt, Esquire, Divisional Judge, Attock Division, dated the 25th November 1909.

Nanak Chand for appellants.

Goviud Das for respondents.

The judgment of the learned Judge was as follows :—

26th Nov. 1910.

SIR ARTHUR RIED, C. J.—I see no reason for interference. The shrine admittedly contains the tomb of the ancestor of the plaintiffs-respondents. Counsel for the appellants has been unable to establish the contention that the respondents came into Court on a specific allegation of a special agreement entitling them to oust the appellants and has further been unable to cite evidence of any income from the shrine.

Although *Muhammad Tahir v. Najibulla* ⁽¹⁾ deals with a shrine in the Peshawar District, I see no reason to doubt that the rule held therein to be established, *viz.*, that *Mujawars* generally in shrines in the Peshawar District are servants liable to dismissal, is the rule generally governing *Mujawars* in the adjacent district of Attock.

As pointed out by the learned Divisional Judge, long service and the fact that the appellants have built houses in the neighbourhood of the shrine, do not deprive the respondents of the right to dismiss and eject the appellants, though the latter may be entitled to compensation on ejectment.

The appellants stated in the Court of first instance that their case was closed, and no ground for a remand has been established.

Apart from a right to dismiss at will, the facts found by the Courts below constitute good reasons for dismissal.

The appeal fails and is dismissed, but having regard to the long service of the appellants and their ancestors, I leave the parties to bear their own costs of all Courts.

Appeal rejected.

No. 7.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

BHOLA AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

RAZZAQ SHAH—(PLAINTIFF)—
BHOLA SHAH AND OTHERS } RESPONDENTS.
(DEFENDANTS)—

Civil Appeal No. 1254 of 1910.

Customary law—Alienation—Necessity—Madaris (jugglers), Ludhiana District, agriculturists bound by custom.

Held, that the parties to the suit, *Madaris* (jugglers) of the Ludhiana District, though not among the agricultural tribes in the census report or in the list of agricultural tribes of the district compiled for the purposes of the Land Alienation Act, had by cultivating agricultural land for several generations as their only means of livelihood, adopted and rendered themselves subject to the ordinary agricultural law of the Central Punjab.

Further appeal from the decrees of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 30th November 1908.

Tek Chand for appellants.

Miran Bakhsh for respondents.

The judgment of the learned Judge was as follows:—

SIR ARTHUR REID, C. J.—Although this application remained 26th Novr. 1910. on the Civil Revision Register in consequence of the ambiguous nature of the admitting order “notice section 70 (1) (a) and (b),” it was filed under section 70 (1) (b) and must be treated as an appeal admitted under that sub-section.

The pleader for the appellants cited “the Ludhiana Customary Law” and Volume XIX of the Census Report, 1891, Part I, Punjab, pp. 196-7, for the proposition that the respondents, who are *Madaris* (jugglers), are not agriculturists and consequently are not governed by agricultural Customary Law.

Of the authorities cited for the appellants *Harnam Singh v. Devi Chand* (1) dealt with *Khatris* of the Amritsar District, not dependent on agriculture as cultivators and residents in a town.

Atar Singh v. Prem Singh (2) dealt with *Khatris* who had not been proved to be wholly dependent on agriculture for a living.

Jawahir Singh v. Yaqub Shah (3) dealt with *Quraishis* of Pind Dadan Khan Tahsil, Jhelum District, described as *Pirs*.

(1) 107 P. R. 1901.

(2) 12 P. R. 1906.

(3) 5 P. R. 1906.

Musammam Bakht Bano v. Chiragh Shah ⁽¹⁾ dealt with Qaraisbis of the Rawalpindi District, belonging to a family of *Pirs*, who lived to some extent on offerings made to them as practising *Pir Muridi*.

The respondents are *Madaris* of a district bordering on, even if not included in the Central Punjab, and although some *Madaris* earn their living entirely or partly by juggling, the respondents have been found to have always lived by cultivation and to belong to a family of agriculturists. The fact that their tribe is not included among the agricultural tribes in the census report or in the list of agricultural tribes in the district compiled for the purposes of the Land Alienation Act, does not preclude them from having, by practising agriculture for several generations as their only means of livelihood, adopted, and rendered themselves subject to, the ordinary agricultural law of the Central Punjab, and the authorities cited do not help the appellants, who were not prejudiced, on the findings of fact, by the burden of proof having been imposed on them.

I see no reason for differing from the concurrent findings below on the issue as to necessity, and the plea of limitation taken at the hearing was not taken below in the application to this Court, presumably because the suit was instituted within 12 years of the sale, the latter having been effected less than three years before the Punjab Limitation Act, I of 1900, came into force, and the plea had no force.

Appeal fails and is dismissed with costs.

Appeal rejected.

No. 8.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

ALLAN KHAN AND OTHERS —(DEFENDANTS)—
APPELLANTS,

Versus

DOST MUHAMMAD KHAN —(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 120 of 1910.

Indian Limitation Act, XV of 1877, section 14—“Defect of jurisdiction or other cause of a like nature”—Not applicable to defect “in form of suit.”

Held, that section 14 of the Indian Limitation Act, 1877, does not apply to a case in which a plaint was found to be bad by reason of misjoinder of causes of action and of parties and was returned for amendment. And that the words in section 14 “is presented in good faith in a Court

"which from the defect of jurisdiction or other cause of a like nature "is unable to entertain it", cannot be extended to cases, in which a Court can entertain a suit, but is unable to pass a decree by reason of defect in the form of a suit.

Raja of Faridkote v. Sirdar Gurdial Singh ⁽¹⁾, *Narayanan Chetty v. Kannammai Achi* ⁽²⁾ and *India Publishers, Limited v. Aldridge* ⁽³⁾ followed, *Mathura Singh v. Bhawani Singh* ⁽⁴⁾ dissented from.

Further appeal from the decree of A. H. Parker, Esquire, Divisional Judge, Multan Division, dated the 8th October 1908.

Ishwar Das and Zia-ud-Din for appellants.

Bindra Ban for respondent.

The judgment of the learned Judge was as follow :—

SIR ARTHUR REID, C. J.—This appeal and civil appeals Nos. 29th Nov. 1910. 121 and 122 can be disposed of together, the points involved being the same. The questions for consideration are whether section 14 of the Limitation Act applies to a case in which a plaint was found to be bad by reason of misjoinder of causes of action and of parties, and was returned for amendment, and whether the words in section 14 "is prosecuted in good faith "in a Court which from the defect of jurisdiction or other "cause of a like nature is unable to entertain it", can be extended to cases in which a Court can entertain a suit, but is unable to pass a decree by reason of defect in the form of a suit. The lower appellate Court held that the cause of the inability of the Court to decide the previous suit was that the plaintiff, instead of mistakenly going to a wrong Court, had mistakenly joined cause of action and parties and mistakenly omitted to pay Court fee on a plaint. The lower appellate Court was of opinion that these two causes were both of the nature of mistakes arising from ignorance of legal technicalities, and consequently held that the plaintiff-respondent was entitled to deduct about 16 months expended in rectifying his mistakes from the period of limitation. The learned advocate for the appellant cited *Raja of Faridkote v. Sirdar Gurdial Singh* ⁽¹⁾, *Narayanan Chetty v. Kannammai Achi*, ⁽²⁾ and *India Publishers Limited v. Aldridge* ⁽³⁾, for the proposition that section 14 is inapplicable. These authorities are all directly in point. At page 123 of the *P. R.* case the judgment runs—

"Obviously the British Courts had jurisdiction to try the "suit, there was no 'defect of jurisdiction.' Plaintiff elected

⁽¹⁾ 34 *P. R.* 1898.

⁽²⁾ (1905) *I. L. R.* 28 *Mad.* 338.

⁽³⁾ (1908) *I. L. R.* 35 *Cal.* 723 *F. B.*

⁽⁴⁾ (1900) *I. L. R.* 22 *All.* 248 *F. B.*

“to sue or made a mistake of law and sued on a foreign judgment instead of on his original cause of action can it be said that it was from a ‘cause of like nature’ to defect of jurisdiction that the Court was unable to entertain the suit ?.....We do not think that plaintiff’s suing in a Court of competent jurisdiction by mistake on a foreign judgment, which was a mere nullity, can be held to be a cause of like nature to a defect of jurisdiction in the Court to entertain the suit.”

In the Madras case the judgment included the following passage—

“For the exclusion of time under section 14 of the Limitation Act, the Court must have been unable to entertain this suit from defective jurisdiction or other cause of a like nature There is no doubt that the dismissal of the suit was based on the findings arrived at by the lower Courts.”

In the Calcutta case Maclean, C. J., said—

“In the Allahabad case *Mathura Singh v. Bhawani Singh* (1) the C. J. read ‘unable to entertain’ as substantially identical with ‘unable to decide’.....But I have pointed out the distinction in language in the two statutes (namely Act XIV of 1859 and Act XIV of 1857).....I however agree with Sir Barnes Peacock and Sir Charles Sargent and I do not think that the section was intended to apply to a case in which the first suit has failed entirely by reason of the negligence and *laches* of the plaintiff himself; in other words, I do not think that an improper joinder of parties or of causes of action is ‘a cause of like nature’ within the meaning of section 14 of the Limitation Act.”

“So to hold would be putting a premium on carelessness and *laches*.....I am not much impressed with the argument that, if a plaintiff brings his suit in a Court which cannot entertain it through a defect of jurisdiction, such selection of the Court is as much attributable to his own negligence, as say, a misjoinder of parties

The only authority cited for the respondent is the Allahabad case referred to by the Calcutta Court. It is opposed to the ruling of this Court and of the Madras Court above cited and was expressly dissented from by the Calcutta Court. The

weight of authority is therefore, in my opinion, in favour of the appellant, and I decree the appeal and dismiss the suit with costs of all Courts.

Appeal accepted.

— — —
No. 9.

Before Hon. Mr. Justice Kensington.

ALI MARDAN—(PLAINTIFF)—PETITIONER.

Versus

MUHAMMAD HASSAN AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Miscellaneous No. 446 of 1910.

Pre-emption—House property in Rawalpindi Cantonment—Punjab Pre-emption Act, II of 1905, section 7 (1) and 3 (3).

Held, that notwithstanding Punjab Government Notification No. 677, dated 10th November 1908, declaring Rawalpindi City and Cantonment to be a town under section 3 (3) of the Punjab Pre-emption Act, 1905, a suit for pre-emption in regard to house property in the Cantonment is barred by the provisions of section 7 (1) of the Act

Petition under order XLVII, rule 1, of the Civil Procedure Code, for review of the order of the Hon. Mr. Justice Scott-Smith, dated the 13th July 1910.

Sohan Lal, for petitioner.

Govind Das, for respondents.

The order of the learned Judge was as follows :—

KENSINGTON, J.—The lower Courts concurred in dismissing 5th Dec. 1910. on technical grounds plaintiff's suit for pre-emption of a house situated in an area which had been recently included in the Cantonment of Rawalpindi. A petition for revision to this Court was rejected on the 13th July 1910. The present application was then made for review of the order of the learned Judge who rejected the revision.

It was directed that notice should issue as it was apparent that in all previous orders the material fact had been overlooked that by Government Notification No. 677, dated 10th November 1908 (page 630, Part I, Punjab Gazette), the Local Government had declared Rawalpindi City and Cantonment to be a town under section 3, clause (3) (a) of the Pre-emption Act. That notification was issued before plaintiff filed his suit on the 12th November 1908, and it seemed possible that he should get the benefit of the altered conditions, though the sale in question was effected on the 13th November 1907.

I find however that notwithstanding the notification quoted the plaintiff's suit is barred under section 7 (1) of the Act. House property in a Cantonment is by that section made not subject to a right of pre-emption. Agricultural land can be excluded from the purview of the section when the local Government notifies to that effect, but no authority has been retained to make such notification cover *houses* also. The commentary under section 7 in the second edition of Mr. Shadial's Punjab Pre-emption Act may be referred to.

There may be some doubt whether the Act was intentionally drafted to have this effect, and if it was so intended the object of a notification constituting the Cantonment a town under the Act is far from clear. These however are points for the consideration of the Local Government. This Court has merely to take the Act as it stands. It appears to me impossible to construe it as giving a right of pre-emption in the case of house property situated in a Cantonment under any circumstances whatever.

The application for review is accordingly dismissed.

No order as to costs in this Court, considering the novelty of the point involved and the misleading form of the notification which suggested to plaintiff the course taken by him in moving further.

Application rejected.

No. 10.

Before Hon. Mr. Justice Shah Din.

KANWAL—(PLAINTIFF)—APPELLANT,

Versus

SRI—(DEFENDANT)—RESPONDENT.

Civil Reference No. 70 of 1910.

Jurisdiction—Civil or Revenue Court—Suit for value of a tree—Punjab Tenancy Act, XVI of 1887, section 77 (3) (k)

Held, that where the plaint and plaintiff's statement show that the plaintiff sues for the whole value of a tree as its sole owner, the Civil Court has jurisdiction to try the suit, although the evidence produced by the parties may show that the tree stood on land which was the joint property of the parties—a suit of this description does not fall within section 77 (3) (k) of the Punjab Tenancy Act, (XVI of 1887).

Sultan v. Sher Muhammad (1) distinguished.

Case referred by J. Addison, Esquire, Additional District Judge,
Delhi District, with his No. 515 of 7th November 1910.

The order of the learned Judge was as follows :—

SHAH DIN, J.—This is a reference made by the Additional 19th Dec. 1901.
District Judge of Delhi, under section 100 of the Punjab
Tenancy Act. The learned Judge is of opinion that the suit
out of which this reference has arisen falls within the purview
of clause (k) of sub-section (3) of section 77 of the aforesaid
Act, and was therefore one cognizable by a Revenue Court. He
therefore recommends that the decree of the *Munsif* dismissing
the plaintiff's suit be set aside and the plaint be registered in
the Revenue Court which had jurisdiction to hear the suit.

I have referred to the plaint and the pleadings, and it seems
to me that the suit as laid was a Civil suit and was rightly
taken cognizance of by the *Munsif*. In the plaint the plaintiff
alleges that the tree in dispute was planted by him and that
he alone is its owner. He further says that the defendant has
no concern with the tree, though he has a half share in the turn
of the well, meaning thereby that he (the defendant) is not a
co-sharer in the land on which the tree stands. The plaintiff
therefore claims to recover from the defendant the whole value
of the tree. In his statement made before the settlement of
issues, the plaintiff repeats the allegation that the tree belongs
to him, having been planted by him 30 years ago. He further
says that the *patwari* demarcated the boundary between his share
and that of the others, by which he evidently means that his
share of the land had been separated off. The defendant in his
pleas states that the tree belongs exclusively to him, having
been planted by himself. In his statement he says that the
tree in question stands on his share of the fields. So far,
therefore, as the plaint and the pleadings in the case go, there
is no allegation either by the plaintiff or by the defendant that
the parties are co-sharers in the tree, and that being so, I fail to
see how the suit, as laid, is governed by clause (k) of sub-section
(3) of section 77 of the Tenancy Act, which only applies to a
suit by a co-sharer in an estate or holding for a share of the
profits thereof or for a settlement of accounts. Clearly the
plaintiff's suit is not a suit by a co-sharer in a holding for a
share of the profits thereof, and therefore the jurisdiction of
the Civil Court is not ousted.

No doubt, in the evidence given by the parties it came out
that the land on which the tree stood was the joint property of

the parties, though each party set up his own exclusive possession; but that merely shows that there was a variation between the pleadings and the proof, which, under certain circumstances, necessitates the amendment of the plaint or the dismissal of the suit. So long, however, as the plaint and the plaintiff's statement stood as they were, there was no warrant for saying that the Civil Court had no jurisdiction to entertain the suit.

The decision of this Court in *Sultan v. Sher Muhammad* (1) does not govern this case. There the plaintiff sued as a co-sharer in a holding for a share of the sale-proceeds of a tree alleged to be the joint property of the parties, and the suit was, therefore, clearly covered by section 77, sub-section (3), clause (k).

I hold therefore that the *Munsif* had jurisdiction to hear and determine the suit, and the appeal ought to have been decided on the merits by the Additional District Judge.

Let the record be remitted to the Lower Court.

No. 11.

*Before Hon. Sir Arther Reid, Kt., Chief Judge, and
Hon. Mr. Justice Johnstone.*

DEVI SINGH AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

MUSSAMMAT PREMI—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1073 of 1908.

Custom—Succession—generally daughter succeeds in preference to pattidars—Wajib-ul-arz—riwaj-i-am—Onus probandi—Jats of mauza Kharindwa, tahsil Thanesar, District Karnal.

Held, that exclusion of daughters by pattidars is opposed to the general custom, and that the burden of proving a special custom entitling them to exclude the daughter is on the pattidars.

Also, that an entry in the record of rights and *riwaj-i-am* in their favour, unsupported by any instances, is not sufficient to discharge the *onus* and that the *onus* had not been discharged.

Further appeal from the decree of S. Olifford, Esquire, Additional Divisional Judge, Delhi Division, dated the 29th June 1908.

Morrison, for appellants.

Sundar Das, for respondent.

The judgment of the Court was delivered by :

SIR ARTHUR REID, C. J.—The parties are Jats of mauza 20th Dec. 1909. Kharindwa, *tahsil* Thanesar, Karnal.

The question for decision is whether the defendant-appellants, as *pattidars* of the village, are entitled to succeed to the estate of Lekhu, deceased, in preference to his daughter Mussammat Premi, plaintiff-respondent.

Lekhu died in 1898. Mutation was effected in March of that year in favour of his widow Mussammat Darkhan and his daughter's son Data Ram, in equal shares. Data Ram died in 1899 and mutation in respect of his share was effected that year in favour of his father Kirpal.

On Kirpal's death in 1902 mutation was effected in respect of Data Ram's share in favour of Mussammat Hasnu, widow of Kirpal, and daughter of Mussammat Darkhan, and on the death of Mussammat Hasnu mutation was effected in favour of Mussammat Darkhan in 1904. Mussammat Darkhan was thus in possession of the whole of Lekhu's estate, and, on her death in 1907, mutation was effected in respect of the whole estate in favour of the *pattidars*, who are not proved or seriously alleged to have been related to Lekhu.

Mussammat Premi then sued for possession, under the guardianship of Mussammat Karmon, she being a minor. The issues framed were whether Mussammat Premi was daughter of Lekhu, and whether her right to his property was superior to the right of the *pattidars* of the village.

We concur with the Lower Appellate Court in deciding the first issue in the affirmative. The record contains ample evidence that Mussammat Premi was born after Lekhu had contracted a *Karewa* marriage with Mussammat Darkhan and while she was living with her husband.

Section 112 of the Evidence Act applies, and we are satisfied, in the absence of evidence that Mussammat Premi was not Lekhu's daughter, that she was his legitimate daughter.

On the second issue also we concur with the Lower Appellate Court.

Exclusion of daughters by *pattidars* is opposed to the general custom, and the burden of proving a special custom entitling them to exclude the daughter was on the appellants.

It was contended that they had discharged this burden by proving the record of rights of the settlement of 1854, which

recited that, in the event of a proprietor dying *lawald*, *bhaikariki* would succeed, then *bhai baidi*, and then *hissadaran patti*.

This record of rights is supported by the *Riwaj-i-am* of 1888, which recited that daughters are absolutely excluded among Jats.

The only instance recorded in support of this recital is the exclusion of a daughter by an uncle's son, a near reversioner, and the settlement officer recorded his doubts as to the existence of a custom in favour of *pattidars* to the exclusion of daughters, *vide* p. 18 of the Customary Law of the Ambala District, in which this village was.

Counsel for the respondent cited *Shaman v. Sardha* ⁽¹⁾, *Allah Ditta v. Allah Bakhsh* ⁽²⁾, *Ram Saran Das v. Mulla Singh* ⁽³⁾, *Thakar Das v. Motan Mal* ⁽⁴⁾, *Abdul Karim v. Sahib Jan* ⁽⁵⁾, *Bholi v. Man Singh* ⁽⁶⁾, *Ganpat Rai v. Kesho Ram* ⁽⁷⁾ and *Gurdit Singh v. Mussammat Prem Kaur* ⁽⁸⁾.

A consideration of these authorities, with the fact that no instance of exclusion of a daughter by *pattidars*, as such, has been proved, satisfies us that the initial burden of proof on the appellants has not been discharged, the weak presumption raised by the record of rights and *Riwaj-i-am* having been rebutted by the absence of instances, and the general law and the rules laid down in the authorities cited.

Section 44 of the Revenue Act, cited for the appellants, does not help them, the fact to be established here being the existence of a custom, and not a fact of the class contemplated by the section.

The appeal fails and is dismissed with costs of all Courts. This disposes of the cross objection that the respondent should have been allowed costs by the Lower Appellate Court.

Appeal dismissed.

⁽¹⁾ 61 P. R., 1898

⁽²⁾ 89 P. R., 1900.

⁽³⁾ 64 P. R., 1903.

⁽⁴⁾ 77 P. R., 1906.

⁽⁵⁾ 5 P. R., 1908.

⁽⁶⁾ 86 P. R., 1908.

⁽⁷⁾ 34 P. R., 1909

⁽⁸⁾ 84 P. R., 1909.

No. 12.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice
Chevis.

ASA SINGH—(DECREE-HOLDER)—APPELLANT,

Versus

BUTA AND OTHERS—(JUDGMENT-DEBTORS)—
RESPONDENT.

Civil Appeal No. 510 of 1909.

Punjab Alienation of Land Act, XIII of 1900, sections 2 (3), 16 and 21 A (2)—definition of land—Mortgage rights in agricultural land—Sale of—Cancelled on application of Deputy Commissioner—Jurisdiction of Divisional Judge—Appeal—Revision—Punjab Courts Act, XVIII of 1884, Section 40.

Held, that no appeal lies, as of right, to the Chief Court from an order passed by the Divisional Court upon an application made by the Deputy Commissioner under section 21 A (2) of the Punjab Alienation of Land Act, 1900 for revision of the order of an executing Court sanctioning the sale of the judgment-debtor's mortgage rights in agricultural land to the decree-holder, the order, though a decree, not being an *appellate* decree within the meaning of section 40 of the Punjab Courts Act.—But *held*, that the provisions of section 21 do not take away the right which a party to a suit or an execution proceeding has of applying to the Chief Court under the general provisions of section 70 of the Punjab Courts Act for revision of such an order.

Held also, that when a Divisional Judge refrained from passing a definite order on an application for revision made by the Deputy Commissioner under section 21 A (2) of the Punjab Alienation of Land Act, he had full jurisdiction to pass such an order upon a second application made by the Deputy Commissioner.

Held also, that the word "land" as defined in section (3) of the Punjab Alienation of Land Act includes mortgage rights in land. (1)

Held also, that where a sale of mortgage rights in execution of a decree contravenes provisions of section 16 of the Punjab Alienation of Land Act, the mere fact that the right of receiving the mortgage money from the mortgagor personally was also included in the terms of the mortgage deed, will not validate the sale, which must stand or fall as a whole.

Held further, that when a sale of land belonging to a member of an agricultural tribe is made under order of a Civil Court in execution of a decree, the provisions of section 16 of the Punjab Alienation of Land Act are contravened and section 21 A of the Act applies.

*Miscellaneous appeal from the order of T. J. Kennedy, Esquire,
Divisional Judge, Rawalpindi Division, dated the 30th
November 1903.*

Ishwar Das, for appellant.

Muhammad Iqbal, for respondent.

(1) 6 P. R. 1903, *Rev (Sukbashi Ram v. Akbar Shah)* approved.

10th Dec. 1910,

The judgment of the Court was delivered by—

SHAH DIN, J.—This is an appeal admitted under section 70 (1) (b) of the Punjab Courts Act. The facts of the case out of which this appeal has arisen are briefly these. The appellant, Asa Singh, obtained a decree against the respondent, Buta, in 1897 for Rs. 1,784. The decree-holder sued out execution, and mortgage rights possessed by the judgment-debtor in one-half of two separate holdings of agricultural land amounting to 21 *kanals* 6 *marlas* and 7 *kanals* 9 *marlas* respectively, were attached and sold to the decree-holder himself. The auction sale of the judgment-debtors' mortgage rights in one-half of 21 *kanals* 6 *marlas* took place on the 21st April 1903 for Rs. 150, and it was sanctioned by the Court on the 23rd April; while the mortgage rights in one-half of 7 *kanals* 9 *marlas* were sold on the 11th November 1903 for Rs. 49 and the sale was sanctioned on the 4th December 1903. The rights which the judgment-debtor possessed under his mortgage in respect of both plots of land specified above were those of a usufructuary mortgagee, and it is not denied that the judgment-debtor was actually in possession of those holdings at the time when the auction sale in respect of his mortgage rights were made and sanctioned.

On the 18th July 1907 the decree-holder, in his capacity as auction-purchaser, made an application to the executing Court stating that he had purchased the judgment-debtors' mortgage rights in one-half of 21 *kanals* 6 *marlas* of land and praying that a sale certificate in respect of the said rights be granted and possession of the land be delivered, to him. Upon this application the Court passed an order on the 4th September 1907, saying that the auction sales on question should be understood to have been made under section 299, Civil Procedure Code, (1882), and directing that the mortgage-deeds, which had been sold, be made over to the auction-purchaser. The mortgage-deeds were delivered to the decree-holder accordingly, and he has on the strength of those deeds brought a suit for possession of the mortgaged lands. The precise nature of that suit has not been explained to us by the learned Advocate for the appellant, nor is the record of it before us; but it is admitted that a suit for possession of the mortgaged lands has been brought by him and that it is still pending.

On the 22nd June 1908 the Deputy Commissioner of Rawalpindi made what he called a reference under section 21A (2) of the Punjab Alienation of Land Act, XIII of 1900, to the

Divisional Judge, Rawalpindi Division, pointing out that the judgment-debtor, Buta, being a member of an agricultural tribe, the auction sales of his mortgage rights, which were "land" as defined by section 2 (3) of the Act, by the executing Court were contrary to the provisions of section 16 thereof, and asking that the orders of the executing Court sanctioning the said sales be set aside. The Deputy Commissioner also pointed out that the order of the Court, dated the 4th September 1907, to the effect that only the mortgage-deeds had been auctioned was unsound. The Divisional Judge evidently did not realize the scope of section 21 A (2) of the Alienation of Land Act, and wrote an order on the 20th June 1908, saying that the order of the executing Court, dated the 4th September 1907, not having been appealed against was final, and that as the subject matter of the suit brought by the decree-holder as auction-purchaser under the Court sales was still *sub judice* and might come before him on appeal, he could give no opinion on the points raised by the Deputy Commissioner. On the 1st July 1908, the Deputy Commissioner again drew the attention of the Divisional Judge to the provisions of section 21 A (2) of the Act aforesaid, and pointed out that he had applied, and was again applying, for revision of the order of the executing Court sanctioning the sale of the judgment debtor's mortgage rights to the decree-holder, such sale being contrary to the provisions of the Act. Upon this the Divisional Judge passed the order, dated the 14th November 1908, cancelling the auction sales in question, from which an appeal was preferred to this Court by the decree-holder, Asa Singh, urging :—

- (1) that the Divisional Judge had no jurisdiction to entertain a second application for revision by the Deputy Commissioner after having rejected the first application ;
- (2) that the Divisional Judge was wrong in law in holding that the word "land" in section 2 (3) of the Alienation of Land Act included mortgage rights in such land ; and
- (3) that the Divisional Judge was wrong in holding that section 21 A of the Act applied to a sale made under the orders of a Civil Court.

The Judge in Chambers before whom the case came up for a preliminary hearing held, that no appeal lay to this Court as of

right, but as in his opinion important questions of law were involved and they required further consideration, he admitted the appeal to a Division Bench under section 70 (1) (b) of the Punjab Courts Act.

Before us the learned Advocate for the appellant has contended that an appeal lies as of right to this Court, while on the other hand, the respondent's counsel has urged as a preliminary objection that a petition for revision could not lie in this case under clause (b) of section 70 (1) of the Punjab Courts Act. These contentions have to be disposed of before we enter upon the merits of the case. As regards the contention advanced by the appellant's Advocate, we think it has no force. The order impugned is one passed by the Divisional Judge, not as an Appellate Court but as a Court of revision, upon an application made by the Deputy Commissioner under section 21 A (2) of Act XIII of 1900 for revision of the order of the executing Court sanctioning the sale of the judgment-debtor's mortgage rights in agricultural land to the decree-holder, and as the aforesaid section confers no right of appeal from the order of the Divisional Judge on the aggrieved party, no such right can be conceded to the decree-holder in this case apart from the provisions of the Punjab Court Act. Under section 40 of that Act, it is only from an appellate decree of the Divisional Court that a further appeal lies to this Court, and as obviously the order complained of, though a decree within the meaning of the Civil Procedure Code, is not an appellate decree (no appeal having been filed from an original decree to the Divisional Court), the aggrieved party has no right to prefer a further appeal to this Court. We, therefore, overrule the learned Advocate's contention. We are equally clear that the preliminary objection raised by the respondent's counsel is untenable. Section 21 A of Act XIII of 1900 lays down special rules of procedure for the benefit of the Deputy Commissioner concerned, who is empowered to apply for the revision of a decree or order passed by a Court in contravention of any of the provisions of the Act "to the Court" "if any, to which an appeal would lie from such decree or order" "or in which an appeal could have been instituted at the" "time when the decree or order was passed or in any other" "case to the Chief Court." If the Appellate Court passes an order rejecting the Deputy Commissioner's application, he may, within a prescribed period, apply to the Chief Court for revision thereof. But for the enactment of this latter provision the Deputy Commissioner would not have been able to invoke the

revisional jurisdiction of this Court and therefore the legislature thought it necessary to enact sub-section 21 A of this Act. The enactment of this special provision for the benefit of the Deputy Commissioner however, does not take away the right which a party to a suit or an execution proceeding has of applying to this Court under the general provisions of section 70 of the Punjab Courts Act for revision of an order or a decree passed in a case in which no appeal lies to this Court. Section 21 A of the Alienation of Land Act, while it confers upon the Deputy Commissioner a special right of applying to this Court on the revision side, does not expressly negative the exercise of any such right on the part of an aggrieved party; and it would certainly be imputing to the legislature a most unreasonable intention to hold that the right possessed by such a party of invoking the revisional jurisdiction of this Court under the general law of the land is taken away by necessary implication simply because the aforesaid section does not confer such power on such party equally with the Deputy Commissioner. The contention of the respondent's counsel, if accepted, would work obvious injustice and lead to grotesque consequences, and we are not prepared to accede to it, unless compelled to do so by the plain language of an enactment. We have been referred to no such enactment, and we, therefore, overrule the preliminary objection.

Coming now to the grounds of appeal, the first ground has in our opinion, no force. It is clear from the order of the Divisional Judge, dated the 25th June 1908, that the Deputy Commissioner's application for revision was not "rejected" by the Divisional Judge. The latter officer, as has been noticed above, did not understand the scope of the Deputy Commissioner's application, nor did he grasp the precise bearing on it of section 21 A of Act XIII of 1900. He simply refrained from passing a definite order; and this surely did not amount to a rejection of the application for revision. In our opinion, therefore, the second application for revision, upon which the Divisional Judge passed the order under consideration, amounted merely to a renewal or amplification of the first application. That being so, the Divisional Judge had full jurisdiction to pass an order upon the Deputy Commissioner's second application of the 1st July 1908, and we hold accordingly. As regards the second ground of appeal it is not now disputed that the ruling of the Financial Commissioner in No. 6 P. R. 1903 (*Revenue*) (1) is correct, and that, therefore, the mortgage rights of

(1) 6 P. R. 1903, Rev. (*Sukhbashi Ram v. Akbar Shah*).

the respondent, Buta, in one-half of 21 *kanals* 6 *marlas* and one-half of 7 *kanals* 9 *marlas* of land were "land" within the meaning of section 2 (3) of the Alienation of Land Act. It is, however, urged that it was only the mortgage deeds relating to the lands in question, which were in possession of Buta, that were sold at the auction sales held on the 21st April 1903 and 30th November 1903, and that the mortgage rights of Buta in those lands were never sold. This point is not raised in the grounds of appeal and cannot be allowed to be raised for the first time in argument even, however, if the point could be raised at this stage, we are clearly of opinion that it was the mortgage rights of Buta that were sold by auction, and not the mortgage deeds only. The order of the executing Court, dated the 4th September 1907, takes an incorrect view of the nature of the property sold in execution of the decree, for if only the mortgage deeds had been sold and not the mortgage rights that accrued under those deeds, we fail to understand why the auction-purchaser, who was the decree-holder himself, should have paid Rs. 150 as purchase-money at the first sale and Rs. 49 at the second, these sums representing very nearly the original values of the mortgage rights possessed by the judgment-debtor under his mortgage deeds. All doubts on this point are set at rest by the decree-holder's own application, dated the 18th July 1907, in which he distinctly stated that he had purchased the mortgage rights of the judgment-debtors, and that he was entitled to get a sale certificate and to have the possession of the mortgaged land delivered to him. We, therefore, hold that it was the mortgage rights of the judgment-debtors in the above mentioned land that were sold to the auction-purchaser and the question for decision is whether the sale of those rights was in contravention of any of the provisions of Act XIII of 1900. It is urged that the rights of the mortgagee, Buta, under his mortgage deeds included not only the rights to take possession of the mortgaged land and to appropriate the profits thereof but also the right to recover the mortgage-money from the mortgagor, and that this latter right certainly is not "land" within the meaning of section 2 (3) of the aforesaid Act. We think that this distinction between the two kinds of rights is immaterial for the purposes of this case, inasmuch as the right of the mortgagee to receive rents and profits being admittedly "land" as defined by the Act, the mere fact that other rights not included in the definition of "land" may also be considered to have been sold to the decree-holder does not render the auction sale of the entire bundle of mortgage rights

a valid sale of land for the purposes of the Alienation of Land Act. The sale in question must stand or fall as a whole, and as the order sanctioning the sale, which was impugned by the Deputy Commissioner, covered the sale of the mortgage rights which admittedly were "land" without making any such distinction between the two kinds of rights as is now sought to be drawn by the appellant's Advocate, that order as a whole was contrary to the provisions of section 16 of Act XIII of 1900. The second ground of appeal is, therefore, overruled.

The third ground of appeal was not seriously pressed, and it could not well be pressed, inasmuch as section 21 A of the Act in very clear terms applies to an order passed by a Civil Court in contravention of any of the provisions of the Act, and obviously when a sale of land belonging to a member of an agricultural tribe is made under orders of a Civil Court in execution of a decree, the provisions of section 16 of the said Act are contravened.

For the foregoing reasons we hold that the order of the Divisional Judge cancelling the orders of the executing Court by which the sales of the mortgage rights of the judgment-debtor, Buta, were sanctioned was correct, and we dismiss this appeal with costs.

Appeal dismissed.

No. 13.

Before Hon. Mr. Justice Shah Din.

KARM DIN AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

MUSSAMMAT JIO—(DEFENDANT)—	} RESPONDENTS.
FATTEH DIN AND ANOTHER—	
(PLAINTIFFS)—	

Civil Appeal No. 404 of 1910.

Custom (Alienation)—Gift by sonless proprietor of part of his ancestral land to his daughter—Arains of mauza Dholewala, tahsil Zira, district Ferozepore.

Held, that among Arains of mauza Dholewala, tahsil Zira, district Ferozepore a sonless proprietor has by custom the power to make a gift of a portion of his ancestral land in favour of his daughter, whose husband is the donor's *ghar-jauai* or resident son-in-law.

Further appeal from the decree of Rai Bahadur Lala Mul Raj, Divisional Judge, Ferozepore Division, dated the 2nd June 1909.

Miran Bakhsh, for appellants.

Amar Nath Bhatia, for respondents.

The judgment of the learned Judge was as follows :—

7th Dec. 1910.

SHAH DIN, J.—The parties in this case are Arains of *manza* Dholewala in the Zira *tahsil* of the Ferozepore district, and the question for decision is whether by custom applicable to them a sonless proprietor has the power to make a gift of a portion of his ancestral land in favour of his daughter whose husband is the donor's *ghar-jawai* or resident son-in-law. The appellants' counsel has urged that it is not proved that the husband of Mussammat Jio, in whose favour the gift in dispute has been made, is a resident son-in-law of Hasham, the donor; but both the Courts below have concurred in holding that he is Hasham's *ghar-jawai*, and as this appeal is one admitted under clause (b) of section 70 (1) of the Punjab Courts Act, the finding of the lower Appellate Court on this point being one of fact, can not be impugned in this Court. Admittedly Hasham owned 102 *kanals* of land, and he has only gifted 61 *kanals* and 2 *marlas* out of his estate.

Both the Courts below have held that the gift in dispute is valid by custom, and after hearing arguments on both sides, I entirely concur in that finding. As the learned Divisional Judge has pointed out, the published decisions of this Court show that among the Arains of the Hoshiarpur and Jullundur districts the power of a sonless proprietor to gift ancestral land in favour of his daughter or daughter's son in the presence of near collaterals is very extensively recognised, and it would not be unreasonable to presume that a similar custom prevailed among the Arains of the Ferozepore district.

In No. 37, *P.R.* 1878 (1) it was held by this Court that among the Arains of the Hoshiarpur district custom did not preclude a sonless male proprietor from making a gift of the whole of his property to his daughter's son. Plowden, J. in his judgment in that case says: "in view of the reported deviations in "the *Punjab Record* for the past twelve years, I think it can be "hardly said that an alienation by a sonless proprietor of a "portion of his ancestral land to his daughter's son is opposed to "general custom in the Punjab." The learned Judge then proceeds to refer to the instances bearing upon the custom in question, and finds that though the *onus* lay upon the daughter's son to prove that the gift was valid, he had succeeded in discharging it.

(1) 37 *P.R.* 1878 (*Mussammat Rajadan v. Umra*).

In No. 92 *P. R.* 1888 ⁽¹⁾ it was held that a sonless proprietor among the Arains of the Jullundur district was empowered by custom to make a gift of ancestral land to a daughter's son.

In No. 2 *P. R.* 1897 ⁽²⁾ it was laid down that among the Arains of the Jullundur district a gift by a sonless proprietor of his entire estate in favour of his daughter is valid in the presence of the donor's nephews.

In No. 83 *P. R.* 1900 ⁽³⁾ it was decided that among Arains of the Jullundur district a gift by a sonless proprietor of the whole of his estate in favour of his daughter's son in the presence of near collaterals was valid by custom.

It is urged by the pleader for the respondents that the above decisions raise a presumption that among the Arains of the Ferozepore district a sonless proprietor has power to make a gift of ancestral property in favour of his daughter or daughter's son, and that, therefore, the gift in dispute is *prima facie* valid. The entries in the vernacular *Riwaj-i-am* of the Zira *tahsil* prepared by Mr. Francis (Chapter X, pages 79 and 80) go to show that a sonless proprietor has power to make a gift of a portion of his estate to his daughter by way of dowry or otherwise, and several instances of such gifts by Arains are given under answers to questions 86 and 87 which have to be read with the answer to question 90.

The decision of this Court reported as No. 107 *P. R.* 1892 ⁽⁴⁾ strongly supports the respondents' contention. In that case it was held that according to the custom of the Arains of *tahsil* Zira in the Ferozepore district a *khanadamad* may be appointed to succeed to the estate of a sonless proprietor to the exclusion of his brothers and nephews. If a *khanadamad* could be so appointed by custom applicable to the Arains *a fortiori* the daughter whose husband is a *khanadamad* can be appointed an heir, the real intention in all these cases being to benefit the daughter's issue. Furthermore, if the daughter could validly be appointed an heir, her succession can be accelerated by means of a gift in her favour, and that is precisely what has happened in this case.

The respondents' witnesses have given several instances in which an Arain proprietor has made a gift of ancestral property

(1) 92 *P. R.* 1888 (*Nihal v. Pala*).

(2) 2 *P. R.* 1897 (*Sadulla v. Husain*).

(3) 83 *P. R.* 1900 (*Alla Dia v. Nur Bakhsh*).

(4) 107 *P. R.* 1892 (*Pir Bakhsh v. Isa*).

in favour of his daughter. Mussammat Bhago states that her father, Ilahia, gifted his land to her, her husband being a *khanadamad*. A suit was brought by the collaterals of Ilahia to contest the gift in question, but it was dismissed, both the Courts of first instance and the Appellate Court holding that the gift was valid by custom (see copies of judgments in *Muhammad Bakhsh and others versus Ilahia and others*, dated the 3rd December 1907, and the 15th May 1908, respectively). Pir Bakhsh, witness, mentions five instances in which gifts were made by sonless Arains to their daughters, and none of those gifts was ever contested. Rohola similarly mentions a gift made by one Yusaf, a sonless Arain, to his daughter's son. It is said that the reversioners sued to set aside the gift, but the suit was dismissed. This witness also mentions four other gifts to daughters which were made with the consent of the reversioners of the donors concerned.]

The appellants' counsel admits that he is unable to cite one single instance in which a gift by a sonless Arain in favour of his daughter or daughter's son or *khanadamad* was ever set aside on the suit of his reversioners, and he does not dispute that one of the appellants' witnesses named Rana, mentions an instance of a gift having been made by a sonless proprietor belonging to the appellants' family in favour of his daughter, which gift is not shown to have been challenged by any of the donor's reversioners.

For the foregoing reasons, I hold, in agreement with the Courts below, that Hasham was empowered by custom to make the gift in dispute in favour of his daughter, Mussammat Jio, and upholding the decree of the lower Appellate Court I dismiss this appeal with costs.

Appeal dismissed

No. 14.

Before Hon. Mr. Justice Johnstone.

DR. MIR HAIDAR AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

MUHAMMAD ALI—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 956 of 1909.

Custom (Alienation).—Widow's right to alienate—Sayads of Sialkot City—Muhammadan law.

Held, that although the initial presumption in the case of non-agricultural Sayads, residents of a city, is that they follow Muhammadan law,

yet where in defiance of that law, widows take over the whole of their husbands' immovable estate, a natural presumption arises that they do so, as life-holders only, subject to control by male reversioners.

Held therefore, that among the parties to the suit, Sayads of Sialkot city, there is a presumption in favour of custom, under which alienations by a widow of house property inherited from her husband are liable to be contested by the husband's brother.

*Further appeal from the decree of A. H. Parker Esquire,
Divisional Judge, Sialkot Division, dated the 22nd July 1909.*

Fazal-i-Husain and Muhammad Iqbal, for appellants.

Muhammad Taj-ud-din, for respondent.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—In this case the sole question left for deter- 29th Nov. 1909.
mination in this second appeal is whether these Sayads of Sialkot city follow Muhammadan law or follow any well defined custom under which alienations by a widow of house property inherited from her husband are liable to be contested by the husband's brother. The issue was first drawn so as to lay on plaintiff the burden of proving that custom governed the case; but on hearing preliminary arguments the first Court changed the *onus* and laid it upon defendants, who were called upon to prove that Muhammadan law must be looked to for the rule of decision.

In my opinion the *initial* presumption in the case of non-agricultural city-dwelling Sayads must always be that they follow Muhammadan law.

The question is whether that presumption has been rebutted. I have read the record and heard arguments. It would be idle to pretend that it is proved that in all respects Muhammadan law has been followed, but it is equally impossible to say that the family has in all respects adopted agricultural custom. As regards Muhammadan law we have only to consider that both the whole of the landed estate of the late Sher Ali and his house have gone to his widow, defendant 2, in their entirety, and that in the case of three uncontested alienations by Sayad widows of Sialkot those of 1879, 1885 and 1905, mentioned by Mr. Fazal-i-Husain—the widows similarly seem to have succeeded to the whole of their deceased husbands' effects. These alienations, being uncontested, may be made the basis of an argument that no custom of control of such alienations exists, though, as we shall see, the argument would not be an unassailable one; but they may also be used as showing that succession in these families is not in accordance with the elaborate Muhammadan

system of dividing up an estate among all sorts of near relatives in prescribed shares. Again in some of the precedents set forth in this case we find daughters wholly excluded from inheritance, as indeed happened in the present case.

On the other hand, no clear case has been brought to my notice of control of alienations of immovable property, and this leaves the question to be decided, one of some difficulty. Mr. Taj-ud-din has no difficulty in showing that the four precedents relied upon by Mr. Fazal-i-Husain in argument, namely judgment of Mr. Lawrence of 11th February 1863, judgment of the Divisional Judge of 7th November 1895, and the two cases of 1900 and 1905 are not of much value. The last was decided on the *dictum* of a sort of arbitrator, who was himself a defendant in the case. The second is hardly in point at all. The third is most like the present case; but neither it nor the first is precisely on all-fours with it. In three it was held that the Sayads of Sialkot city followed Muhammadan law, and in the second we have a similar general *dictum* as to Syads of *tahsil* Raya. But the first was written at a time when these questions of custom were not understood.

Mr Taj-ud-din lays special stress on certain observations of Rattigan, J., at page 288 of 74 P. R. 1902 (1), a ruling I assisted in propounding; but I think the authority most clearly in point here is 18 P. R. 1906 (2), in which Lal Chand, J., and myself pointed out that, where, in defiance of Muhammadan law, it is found that widows take over the whole of their husbands' immovable estate, there is a natural presumption that they do so as life-holders only subject to control by male reversioners. I fully endorse that *dictum* because it seems to me, that Muhammadan law being clearly renounced, a custom under which a widow should take all her husband's land and houses as a full owner subject to no control is in this country an unthinkable custom. It is so contrary to general sentiment and practice, that it would have to be strictly proved; that is, it would have to be shown that widows had, in a reasonable number of cases, vindicated this extraordinary position in the face of opposition by near reversioners. Nothing of this kind has been shown here.

Mr. Fazal-i-Husain argued that, as no custom is directly proved of control by reversioners, plaintiff should have sued for

(1) 74 P. R. 1902 (*Muhammad Anwar-ul-Haq v. Habib-ul-Rahman*).

(2) 18 P. R. 1906 (*Abul Hassan v. Habib-ullah*).

possession of his *share* under Muhammadan law ; but the remarks I have just made show that in my opinion there is in the present case a presumption in favour of a custom of control, and this amounts to sufficient proof.

For these reasons, I dismiss this appeal with costs.

Appeal dismissed.

No. 15.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

MOTI RAM AND OTHERS—(PLAINTIFFS)—APPELLANTS.

Versus

HARBHAGWAN DAS—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 494 of 1910.

Mortgage—Simple usufructuary—Sale of mortgaged property in execution of decree for instalments due—Validity of—Transfer of Property Act, IV of 1882, sections 67 and 99.

Where a mortgage-deed of a house for Rs. 600 contained no condition for right of entry in default of payment and no undertaking to repay the principal, the sole conditions being for payment by the mortgagor of Rs. 45 per annum as rent for the occupation of the house and in default of payment of rent for one year, for payment of interest at 2 per cent. per mensem on the rent due and for recovery by the mortgagees of interest from year to year from the mortgaged property and from the other property of the mortgagor, and the mortgagee in 1897 sued and obtained a compromise decree for Rs. 200, recoverable first from the mortgaged property and then from the other property of the mortgagor, and in 1898 the mortgagees applied for execution of their decree by sale of the mortgaged property and, on obtaining permission to bid at the sale, purchased the property in 1899, and received possession in 1903 by a certificate signed by the mortgagor who remained in possession as tenant, and on refusal to vacate, the present suit for possession was filed by the mortgagees in 1909 and dismissed by both the Courts on the ground that the sale was void under section 99 of the Transfer of Property Act, 1882.—

Held, by the Chief Court on further appeal—

(1) that the mortgage was a simple mortgage usufructuary as defined in Macpherson on Mortgages, ed. IV, p. 14,

(2) that the suit of 1897 was of the nature described in section 67 of the Transfer of Property Act as a suit for an order that the property mortgaged be sold, (the remedy prescribed for a simple mortgage) and clause (a) of the section was not applicable and did not bar the suit for sale,

(3) that the rule contained in section 99 of the Act was inapplicable, the compromise decree having specifically provided for recovery of the amount due by sale,

(4) that moreover section 99 of the Act had not been extended to the Punjab, and had been disapproved of as a legislative mistake by the

select committee appointed to consider the amendment of the Code of Civil Procedure, and

(5) that the purchase by the mortgagees was consequently valid and conveyed a good title to them, entitling them to a decree for possession on the mortgagor declining to vacate and denying their title

Further appeal from the decree of M. L. Waring, Esquire, Divisional Judge, Jullundur, dated the 14th October 1909.

Sheo Narain, for appellants.

Lal Chand and Moti Ram, for respondent.

The judgment of the learned Judge was as follows :—

23rd Dec. 1910.

SIR ARTHUR REID, C. J.—The defendant-respondent mortgaged a house to the plaintiffs-appellants' for Rs. 600, April 27th, 1893.

The mortgage-deed contained no condition for right of entry in default of payment and no undertaking to repay the principal. The sole conditions were for payment by the mortgagor of Rs. 45 per annum as rent for the occupation of the house and, in default of payment of rent for one year, for payment of interest at 2 per cent. per mensem on the rent due, and that the mortgagees could recover interest from year to year from the mortgaged property and from the other property of the mortgagor, payment of as much as half of the principal entitling the mortgagor to a proportionate reduction of the rent.

In August 1897, the mortgagees sued for recovery of Rs. 477 to be recovered from the mortgaged property and the other property of the mortgagor.

In December 1897, a compromise decree was passed for Rs. 200 payable in April-May 1898, and recoverable first from the mortgaged property, and then from the other property of the mortgagor. In July 1898 the mortgagors applied for execution by sale of the mortgaged property, and on the 18th July permission to bid at the sale was granted to the mortgagees. They purchased in April 1899 for Rs 200 and received possession in January 1903, by a certificate signed by the mortgagor, who remained in possession as tenant.

The present suit is for possession of the mortgaged property, the respondent having refused to vacate.

The mortgage has been very loosely described by the Courts below. It was a *simple mortgage usufructuary*, as defined in Macpherson on Mortgages, ed. 4, p. 14, and "as in a pure simple mortgage, the mortgagor was personally liable

"and his estate was subject to be sold on default though "redeemable until sold." There was no necessity for mutual accounts being taken, as none existed, the sole question between the parties being how much of the sums payable annually as interest or rent had been paid and how much was due. The suit of 1897 was of the nature described in section 67 of the Transfer of Property Act, as a suit for an order that the property mortgaged be sold, the remedy prescribed for a simple mortgagee, and clause (a) of the section was not applicable and did not bar the suit for sale. It was therefore unnecessary for a second suit of the same nature to be filed before the mortgaged property could be sold, and the rule contained in section 99 of the Act was inapplicable, the compromise decree having specifically provided for recovery of the amount due by sale. *Shah Mohsih-ud-Din v. Sheo Logan Sahu*, (1) is in point.

A mass of authority was cited on either side.

2 P. R. 1907 (2) dealt with a mortgage by conditional sale and is obviously inapplicable, there having been, moreover, no compromise decree as remarked in the judgment, the mortgage was a "conditional mortgage which plaintiff could not foreclose "without taking certain steps under the Regulation and without "giving a year of grace to the defendants within which to "redeem."

Wadero Sumar v. Sajan Mal (3), is a case in which the Judicial Commissioners of Sind disagreed as to a mortgagee's right to purchase at auction with the permission of the Court, though they concurred in the conclusion that a mortgagor was barred from suing for redemption after the mortgaged property had been sold in execution of a money decree and purchased by the mortgagee. In *Bechu Singh v. Becharam Sahu* (4) it was held, that where a compromise decree directs the sale of mortgaged property in execution in the event of failure by the mortgagor to pay two consecutive instalments and failure took place, the mortgagee was entitled to execute the decree without recourse to another suit.

In *Khairaj Mal v. Daim* (5), their Lordships of the Privy Council stated that they threw no doubt on the principal, acted on in many cases in India, that a mortgagee cannot by

(1) 1909, 2 I. C. 265.

(3) 1909, 1 I. C. 952.

(2) 2 P. R. 1907 (*Jagan Nath v. Budhwa*).

(4) 1909, 10 C. L. J. 91.

(5) (1905) I. L. R. 32 Cal. 296 P. C.

obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken and with the other safeguards usual in a suit on a mortgage.

In *Ashutosh Sikdar v. Behari Lal Kirtania* ⁽¹⁾, it was held, that a sale held in contravention of the terms of section 99 of the Transfer of Property Act was not a nullity but an irregular sale which could be set aside only on application under section 244 of the Code of Civil Procedure before confirmation, unless fraud or other reason for ignorance of sale proceedings was established.

The mortgage in suit was usufructuary and their Lordships proceeded to distinguish the case before them, on the ground that the point in issue in the suit had been referred by the parties to arbitration, and that the case had consequently been taken out of the hands of the Court. This authority therefore does not help the mortgagor. In *Husein v. Shankar Giri* ⁽²⁾ it was held that the son of a mortgagee took an absolute title in the mortgaged property, purchased by him at auction in execution of the mortgagee's money decree, and was not liable to be redeemed at the suit of the heirs of the mortgagor, the transactions having been prior to the passing of the Transfer of Property Act. *Martand Balkishna Bhat v. Dhondo Damodar Kulkarni* ⁽³⁾ cited for the mortgagor here, was distinguished on the ground that in it the mortgagee purchased *benami* through his servant, without consent of the Court. The 22 Bombay case is consequently distinguishable from the present case and does not help the mortgagor.

In *Muthuraman Chetti v. Ettapasami* ⁽⁴⁾, the Court held that if there was in fact a decree for a sale of mortgaged property, the plaintiff as son of the judgment-debtor, born after the date of the decree though before the sale, could not question the sale and had no right of redemption.

In *Dharanikota Venkayya v. Budharazu Surayya Garu* ⁽⁵⁾, it was held that a mortgagor, against whom a simple money decree had been passed in favour of the mortgagee, was not entitled to redeem after the mortgagee had purchased the mortgaged property at auction in execution of the decree. The Court specifically dissented from the 22 Bombay case referred to above.

⁽¹⁾ (1908) I. L. R. 35 Cal. 61 F. B.

⁽³⁾ (1998) I. L. R. 22 Bom. 624.

⁽²⁾ (1899) I. L. R. 23 Bom. 119.

⁽⁴⁾ 1899) I. L. R. 22 Mad. 372.

⁽⁵⁾ (1907) I. L. R. 30 Mad. 362.

In *Mata Din Kasodhan v. Kazim Husain* ⁽¹⁾ at pp. 460-1, Mahmud, J., who was in the minority of one to four, made certain remarks which do not help the respondent. The fact that the mortgage in suit was a simple mortgage usufructuary, distinguishes it from some of the cases above cited, and the weight of authority is very strongly in favour of the conclusion that the purchase by the mortgagees was valid and conveyed a good title to them. Moreover section 99 of the Transfer of Property Act has not been extended to this Province, and has been disapproved of, as a legislative mistake by the select committee appointed to consider the amendment of the Code of Civil Procedure. There is no question here of accounts being taken or of steps preliminary to foreclosure. Under the compromise deed the mortgagees were entitled to payment of a fixed sum on or before a fixed date, and in default of payment were entitled to receive the sum due by sale of the mortgagor's rights and interests in the mortgaged property and to purchase those rights and interests with the Court's permission.

Inasmuch as the mortgagor declined to vacate and denied the mortgagee's title they were at liberty to bring this suit and were entitled to a decree.

The result is, that I decree the appeal and the suit and set aside the decrees of the Courts below with costs of all Courts.

Appeal accepted.

No. 16.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

HARNAM SINGH AND OTHERS—(PLAINTIFFS) APPELLANTS,

Versus

LACHMAN SINGH AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 620 of 1910.

Custom (Alienation) Oral gift of ancestral land by sonless proprietor in favour of daughter's sons—validity of—Kalon Jats of Tahsil Shakargarh District Gurdaspur—Riwaj-i-am.

Held, that among Kalon Jats of Tahsil Shakargarh, District Gurdaspur an oral gift of ancestral land by a sonless proprietor, followed by a mutation, in favour of his daughter's sons, whose father remained in the donor's house from the date of his marriage, is valid by custom under the *Riwaj-i-am* supported by instances.

⁽¹⁾ (1891) I. L. R. 13 All. 432 F. D.

Further Appeal from the Decree of Khan Bahadur Khan Abdul Ghafur Khan, Khan of Zaida, Additional Divisional Judge, Amritsar Division, at Sialkot, dated the 22nd April, 1910.

Vaughan, for appellant.

The order of the learned Judge was as follows :—

17th Jan, 1911.

SIR ARTHUR REID, C. J.—I see no reason for interference.

The answering defendants, now respondents, are sons of Surjan Singh and of his wife, the daughter of Rai Singh, a sonless proprietor of the Kalon Jat tribe of Tahsil Shakargarh, District Gurdaspur.

Rai Singh made an oral gift of ancestral land followed by mutation of names to these defendants and the gift has been attacked by his near collaterals. The record contains evidence which has not been shown to be false, that Surjan Singh remained in Rai Singh's house from the date of his marriage. The *Riwaj-i-am* is in favour of the validity of the gift, and I concur with the Lower Appellate Court in the conclusion that an oral gift, followed by mutation, fulfils the conditions of the *Riwaj-i-am*.

Answers 7 and 10 at pages 34 and 35 of Dade's Customary Law of the Gurdaspur District, are also in favour of the validity of the gift, and the patwari cited 2 uncontested instances of similar gifts in the village and *gôt* of the parties.

89 (1) and 198 P. R. 1900 (2) do not help the appellants, as they dealt with *Riwaj-i-am* unsupported by instances, and 101 P. R. 1895 (3) dealt with a gift by a Mahomadan Gorewha Rajput of the Jullundur District, opposed to the *Riwaj-i-am* in force.

The oral evidence cited for the appellants to the effect that the custom set up did not exist and that no such gift had ever been made in the village is, in my opinion, worthless.

The validity of the gift has been established, and I dismiss the appeal under Order XLI, rule 11 of the Code of Civil Procedure.

Appeal dismissed.

(1) 89 P. R. 1900 (*Allah Ditta v. Allah Bakhsh*).

(2) 108 P. R. 1900 (*Nizam Din v. Shahab-ud-din*).

(3) 101 P. R. 1895 (*Mussummat Lakhon v. Rahmat Khan*).

No. 17.

Before Hon. Mr Justice Johnstone.

MIRAN BAKSH—(PLAINTIFF)—PETITIONER,

Versus

SHER MUHAMMAD—(DEFENDANT)—RESPONDENT.

Civil Revision No. 3157 of 1910.

Arbitration—pendente lite—Agreement to refer, made by parties out of Court—Application presented to Court by one party only—Civil Procedure Code, Act V of 1908, Schedule II, Article I

Where a suit was instituted in June 1910, and on 3rd October parties, agreed out of Court to nominate certain arbitrators to decide their dispute and in pursuance of the agreement had a petition to the Court written out, and owing to the Judge's absence for some days, the petition could not be used until 17th October, when plaintiff *alone* presented it in Court, defendant denying having agreed to arbitration and refusing to join in the presentation—

Held, that not only the writing out of an application, but the presentation of it, must have the concurrence of all the parties, to fulfil the requirements of Article I of Schedule II of the Civil Procedure Code, 1908, and that the lower Court was consequently right in rejecting the application.

Petition under section 70 (a) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of Munshi Muhammad Ali, Sub-Judge, Hoshiarpur, dated the 18th October 1910.

Sukh Dial, for petitioner.

Abdul Qadir, for respondent.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—A suit was instituted in June 1910. On 3rd October the parties apparently agreed between themselves out of Court to nominate certain arbitrators to decide their dispute and, in pursuance of the agreement, had a petition to the Court written out. The Judge being absent for some days, this petition could not be used until 17th October, when plaintiff alone presented it in Court, defendant denying having agreed to arbitration and refusing to join in the presentation. On the following day the matter was argued before the Court, which decided, that as both parties did not make the application no reference to arbitration was possible.

18th Jan. 1911.

As the point was one of some difficulty, I admitted plaintiff's petition for revision and I have now heard arguments.

The law is contained in Schedule II, Civil Procedure Code, 1908. The first article of the schedule runs thus :—

“(1) Where in any suit all the parties interested agreed “ that any matter in difference between them shall be referred “ to arbitration, they may at any time before judgment is pronounced apply to the Court for an order of reference.

“(2) Every such application shall be in writing.”

Article 3 begins thus—

“ The Court shall by order refer to the arbitrator the matter in difference ”. Article 1 states the conditions under which the Court may, and indeed must, make a reference. Those conditions clearly are (a) agreement to refer arrived at by the parties, (b) application by all parties interested. In the present case the parties did enter into an agreement and did concur in having an application written, but only one party presented the application and asked the Court to act upon it. The question is whether article 1 can be said to have been satisfied.

Many authorities have been quoted to me and I have looked at a few more. For plaintiff, who wishes the above question to be answered in the affirmative, Mr. Sukhdial says no direct authority is to be found, but he mentions such cases as 84 P. R. 1901 F. B. (1), *Sami Bai v. Premji Pragji* (2) and *Sulig Ram v. Jhunna Kuar* (3). I do not think any of these proves the point. I need not discuss them because in my opinion the further authorities to be discussed below make the case quite clear against plaintiff. Apart from authorities Mr. Sukhdial's main argument is, that in as much as an agreement in writing to arbitrate entered into between disputants before any suit has been instituted, can be enforced against the wishes of a party to that agreement under article 17 of the schedule, it would be anomalous to hold that an agreement of similar kind is not enforceable, if entered into during the pendency of a suit, merely because one party changes his mind before the actual presentation of an application in Court, especially where the parties have actually gone so far as to draw up the application. This argument, which at first sight seems to have some reason in it, fails when we compare article 1 and article 17. The wording is different, and it is plain that the Legislature contemplated the alleged anomaly, if it is really an anomaly at all, for see the interpretation put upon the law in

(1) 84 P. R. 1901 F. B. (*Jhangli Ram v. Mussammatt Budho Bai*).

(2) (1896) I. L. R. 20 Bom. 394.

(3) (1882) I. L. R. 4 All. 546.

25 P. R. 1902 P. C. (1) at p. 99—(the old Civil Procedure Code was then in force, but the words used have full application here). Their Lordships said :—“ In cases falling under head I* the agreement to refer and the application to the Court founded upon it *must have the concurrence of all parties concerned, and the actual reference is the order of the Court, so that no question can arise as to the regularity of the proceedings up to that point.*”

* i.e. arbitration *pendente lite*.

This seems to me quite clear, and to be in accordance with the common sense view that not only the writing-out of an application but the presentation of it must have the concurrence of all the parties concerned. I would like also to remark that article 17 requires an agreement in writing. It is doubtful whether the application or petition in this case can be called an agreement, but I need not press this point.

In *tur Subbarami Reddy v. Kandadai Rajamannar Ayyangar* (2) lays stress on the necessity for consent of all the parties ; it seems to me that in the present case defendant had a *locus poenitentiae* and took advantage of it. In *Parsidh Narain Singh v. Ghanshyam Narain Singh* (3) it is said that all parties must join in the reference, and *Lal Mohn Pal v. Surya Kumar Das* (4), which at first sight seems against defendant, is really distinguishable. There some parties merely stood apart and took no share in the proceedings, allowing the reference to be made and the award to be prepared and presented in Court without protest, virtually it was taken that they had by silence given consent. Whether the law is correctly stated in that ruling or not, we need not stop to consider, in any case it is no guide here.

For these reasons I dismiss the petition with costs.

Revision rejected.

No. 18.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

BHANJAN RAM—(PLAINTIFF)—APPELLANT,
Versus

SOHAURA—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 848 of 1910.

Limitation--Suit for possession of part of land purchased but not delivered with the rest—Indian Limitation Act, XV of 1877, Schedule II, articles 113 and 144.

(1) 25 P. R. 1902 P. C. (*Ghulam Jilani v. Muhammad Hassan*).

(2) (1903) I. L. R. 26 Mad. 47.

(3) (1904-05) 9 Cal. W. N. 673.

(4) (1906-07) 11 Cal. W. N. 1152.

Held, that a suit for possession of part of land purchased by plaintiff from defendant, but not delivered when the rest of the land purchased was delivered, is not governed by article 113 of the Limitation Act but by article 144 of the Act.

Further appeal from the order of Major B. O. Roe, Divisional Judge, Multan, dated 23rd February 1910.

Sohan Lal, for appellant.

Mukerjee, for respondent.

The judgment of the learned Judge was as follows :—

27th Jan. 1911.

SIR ARTHUR REID, C. J.—This is a suit for possession of land on the ground that it is part of land purchased by the plaintiff from the defendants in December 1896, and that possession of it was not delivered to him by the defendants, when possession of the rest of the land purchased was delivered. The suit was instituted in March 1908. It has been dismissed by the lower Appellate Court on the ground that it was barred by limitation under article 113 of the Limitation Act, being a suit for specific performance of contract. The lower Appellate Court relied on *Muhi-ud-din Ahmad Khan v. Majlis Razi* ⁽¹⁾, in which it was held that a suit to have a sale-deed executed and completed and for possession of property, based on a contract for the sale of certain immovable property in the event of the vendor obtaining a decree establishing his title to the property in a suit filed for that purpose, was governed by article 113. The Court held that the right to possession sprang out of the contract of sale and that the relief by giving possession was comprised in the relief by specific performance of the contract of sale and could not be governed in the suit by any article except 113.

Counsel for the appellant cited (1) 134 P. R. 1883 ⁽²⁾ in which it was held that a suit for possession of certain land mortgaged by a registered deed, by the terms of which plaintiff was to hold possession of, and cultivate the land paying the Government revenue, was governed by article 135 of the Limitation Act, not being a suit to compel the owner of the land to convey a right of possession as that had already been done, but to obtain possession of the land, the right to which had previously been conveyed by the registered deed.

(2) *Sheo Prasad v. Udai Singh*, ⁽³⁾ in which a suit on a sale-deed of certain property of which the vendor was not in possession at the date of sale, though his title to it had been adjudged by a decree against which an appeal was pending, was

⁽¹⁾ (1884) I. L. R. 6 All. 231.

⁽²⁾ 134 P. R. 1883, (*Ram Chand v. Gyan Chand*)

⁽³⁾ (1878) I. L. R. 2 All. 718.

governed by article 136 or 144, the suit not being for the specific performance of a contract to deliver possession, to which article 113 was applicable, but to obtain possession in virtue of the right and title conveyed to the purchaser.

(3) *Shib Lal v. Bhagwan Das*, (1) in which it was held that the execution, registration and delivery of a deed of sale and the payment by the purchaser of part of the purchase-money to the vendor's creditors constituted a full transfer of ownership and entitled the purchaser to maintain a suit for possession of the property sold.

(4) *Ram Prosad Janna v. Lakhi Narain Pradhan*, (2) in which it was held that article 144 governed a suit for possession by a purchaser of land which was at the date of sale not in the possession of the vendor but of a lessee, the period of limitation running from the date on which the vendor recovered possession from the lessee.

(5) *Umed Mal Motiram v. Davubin Dhondiba*, (3) in which it was held that the execution of a registered sale-deed of a house was a complete sale passing title to the purchaser, although the purchase-money had not been paid.

It is true that in the P. R. case cited above, the subject matter of suit was a mortgage, and that article 135 does not contain the words "not hereby otherwise specially provided for" which appear in article 144, but the *ratio decidendi* is applicable to the present case and, before refusing to apply article 144, it must be ascertained that some other article is specially applicable. The authorities above cited fully dispose of the contention that plaintiff's remedy was a decree for specific performance of his contract and not a decree for possession.

The facts of the 6 All. case are clearly distinguishable from those now in suit, the original contract therein having merely given a right to the execution of a sale-deed and the suit being for execution and completion of the sale-deed and the Court having held that the suit for possession of the property, which was the subject of the contract, could not be maintained unless the suit for specific performance of the contract could be maintained.

For these reasons I hold that the suit was governed by article 144 of the Limitation Act and was within limitation.

(1) (1889) I. L. R. 11 All. 244.

(2) (1886) I. L. R. 12 Cal. 197.

(3) (1878) I. L. R. 2 Bom. 547.

I decree the appeal, set aside the decree of the lower Appellate Court and under order XLI, rule 23 of the Code of Civil Procedure Code, remand the appeal for decision in accordance with law.

Appeal accepted.

No. 19.

Before Hon. Sir Arthur Reid, Kt., Chief Judge

ISHAR AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

MUSSAMMAT BASANTI AND OTHERS—(DEFENDANTS)—

RESPONDENTS.

Civil Appeal No. 421 of 1910.

Custom (Succession)—widow of grandson in presence of son—Nigar Jats, Jullundur tahsil.

Held, that by Custom among Nigar Jats of the Jullundur tahsil the widow of the grandson is entitled to succeed for her lifetime or until remarriage equally with the son of a deceased proprietor.

Further Appeal from the order of M. L. Waring, Esquire, Divisional Judge, Jullundur, dated 28th January 1910.

Sheo Narain, for appellants.

Sukh Dial, for respondents.

The judgment of the learned Judge was as follows :—

1st Feb. 1911.

SIR ARTHUR REID, C. J.—The facts are stated in the well reasoned judgment of the Court of first instance, and I see no reason for differing from the concurrent findings of the Courts below that the widow of the grandson has discharged the burden of proving that she was entitled to take for her lifetime or until remarriage equally with the son of the deceased proprietor. The parties are Nigar Jats of the Jullundur tahsil and district. Of the four instances of mutation in favour of widows of deceased sons with sons or grandsons, one is of the parties' village and three are of two villages not far distant. All are of Jats and two including that of the parties' village, Kathar, are of the parties' got. It is true that the mutations were effected in October 1907, July 1907, April 1902 and in 1896, respectively, and that one or at most two only are sufficiently old to preclude the probability of contest, while in the 1907 mutations it does not appear clearly that the male heir was present or was of age, but in one of these last the uncle of the male heir, and in the other the lambardar, reported that both parties were entitled to

mutation. In addition to these four instances Indar Singh, lam-bardar of Beas Pind, the village in which one of the mutations of 1907 and the mutation of 1902 were effected, deposed to two other Jat widows, Mussammat Raj Kour and Mussammat Rupar, having been allowed to represent their deceased husbands when the inheritance opened up.

Against these has been cited only one instance of the Jullundur district, a Nawashahr *tahsil* case, in which the Sub-Judge of Jullundur recorded that the widow had adduced no evidence and had not discharged the burden, which he had imposed on her following the rule laid down in paragraph 9 of Rattigan's Digest.

30 P. R. 1909 (1) cited by the Court of first instance, is very much on all fours with the present case, and the evidence on the record justifies in my opinion, the decree passed in favour of the widow and obviates the necessity for a remand for further evidence in favour of or against the custom set up by her. I see no reason for holding that the plaintiff-appellant had not ample opportunity of adducing evidence.

It is significant that the widow was allowed to take possession of the property in suit on the death of the last proprietor, though it is not alleged that the plaintiff-appellant, who was son of the deceased and uncle of her late husband, was absent from the village.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 20.

Before Hon. Sir Arthur Reid, Kt. Chief Judge.

SARDAR ARUR SINGH—(DEFENDANT)—APPELLANT,

Versus

DAYAL SINGH—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1247 of 1909.

Small cause—Suit for a share in offerings, Darbar Sahib, Tarn Taran—Provincial Small Cause Courts Act, IX of 1887, section 15—Revision—Punjab Courts Act, section 70 (1) (a) and (b).

Plaintiff sued on the allegation that S. S. a *pujari* of Darbar Sahib at Tarn Taran had died leaving, *inter alia*, a share in the *charharva* (offerings) and in the income of a *jagir* attached to the Darbar Sahib, that the plaintiff was the adopted son and heir of the deceased, that defendant No. 1 was the manager of the Darbar Sahib who had collected the offerings and

(1) 30 P. R. 1909 (*Premi v. Khushal Singh*).

income, that defendant No. 2 was the brother of the deceased who claimed to be his heir, and that the share of profits and income amounted to Rs. 800 up to date of suit. The first Court decreed Rs. 657-6-10 against defendant No. 1 which decree was upheld by the Divisional Court on appeal—

Held, that the suit was in the nature of small cause and as the value of it was less than Rs. 1,000 no appeal lay under section 70 (1) (t) of the Punjab Courts Act.

Held also, that the lower appellate Court had not ignored or placed a perversely erroneous interpretation upon any evidence cited, and that a mere misinterpretation of documents or error in law was no ground for interference on revision under section 70 (1) (a).

Further appeal from the decree of W. LeRossignol, Esquire, Divisional Judge, Amritsar Division, dated the 19th April 1909.

Lal Chand for appellant.

Muhammad Shafi and Duni Chand for respondent.

The judgment of the learned Judge was as follows :—

22nd Dec. 1910.

SIR ARTHUR REID, C. J.—The first question for decision is whether the suit is a small cause. If this question is answered in the affirmative, section 70 (1) (b) of the Courts Act is not applicable, the sum in suit being less than Rs. 1,000.

Counsel for the respondent, who objected that section 70 (1) (b) did not apply, cited (1) 188 P. R. 1888 (1) ; (2) 81 P. R. 1889 (2) ; (3) 204 P. R. 1889 (3) ; (4) 84 P. R. 1892 (4), and (5) *Narayan versus Balaji* (5).

The appellant is manager of the temple in suit, and the other defendant is brother of the late Santokh Singh, whose adopted son the plaintiff-respondent claims to be. The suit was for a share of Santokh Singh's share as *pujari* in the income of the Darbar Sahib at Tarn Taran, Amritsar district. The main issue raised here was whether adoption conferred on the plaintiff-respondent the right to share in the offerings and the profits of the *jagir* attached to the Darbar Sahib, constituting the income thereof.

In (1) cited above a Division Bench held, that a suit against the manager, the distributing *darogha* and certain *pujaris* who denied the plaintiff's right for a share of money received for *pujaris* was a small cause, in spite of the fact that a question of title had been raised by the defendant's pleadings.

(1) 188 P. R. 1888 (*Atra v. Jowala Singh*).

(2) 81 P. R. 1889 (*Harnam v. Gandu*).

(3) 204 P. R. 1889 (*Hayat Shah v. Jwaya*).

(4) 84 P. R. 1892 (*Jowahir Singh v. Sardar Man Singh*).

(5) (1895) L. L. R. 21 Bom. 248.

In (2) a Division Bench held, that a suit by certain *acharajs* to recover from the defendant the *virt* realised by him upon a death on a date alleged by plaintiff to have been allotted to them alone, was a small cause and was not excluded from the jurisdiction of a Small Cause Court by article 13 of the second schedule of Act IX of 1887, which must be limited to suits against the person by whom the dues are payable or his legal representative and cannot be extended to suits for recovery of dues from a person to whom they have been wrongfully paid

In (3) Rivaz, J. held, that a suit by the *chaudhris* of a village against the *zumindars* for a sum wrongfully realized by the latter as a percentage on all articles sold in the village, that percentage being the right of the *chaudhris* was cognisable by a Small Cause Court, section 77 (j) of the Tenancy Act being limited to suits against the persons liable to pay such percentage, and article 39, schedule II of Act IX of 1887, not being applicable.

In (4) a Division Bench held that a suit for a certain share of offerings received at a shrine for a certain period, on the allegation that the plaintiffs were successors of the former incumbent against two defendants, one of whom was the manager who held the money in dispute in safe custody only, and the other, a rival claimant, was a small cause.

In (5) a Division Bench, constituted by Farran, C. J. and Parsons, J. held, that a suit for a share in the produce of certain *dhara* and *khote* (immovable) properties, Rs. 339-14-2 or any other sum found due on taking accounts from the defendant, the managing *khot* who denied the plaintiff's right to the produce of some of the properties, was a small cause, in spite of a question of title being raised and an account being asked for in the alternative. Counsel for the appellant cited (6) *Krishna-bhat v. Kapabha* ⁽¹⁾; (7) *Venkaji v. Yamunabai* ⁽²⁾; (8) *Balvantrav v. Purshotam* ⁽³⁾.

In (6) a Division Bench held, that the office of hereditary priest to a temple, though not annexed to or held by virtue of the ownership of any land, was immovable property under Hindu Law and must be treated as such for the purposes of clause 12 of section 1 of the Limitation Act, XIV of 1859.

⁽¹⁾ (1869) 6 Bom. H. C. R. A. C. J. 137.

⁽²⁾ (1870) 7 Bom. H. C. R. A. C. J. 114.

⁽³⁾ (1872) 9 Bom. H. C. R. A. C. J. 99.

In (7) a Division Bench held, that a suit by an alleged sharer in a *hakwarta* allowance belonging to the *deshpande watan* of the joint family, to recover from the defendant, who received the whole allowance from Government, the plaintiff's share in it, was not a small cause within the terms of section 6, Act XI of 1865, "personal property" in that section being limited to chattel movable and not including claims to money other than those distinctly specified in the statute.

With reference to this ruling it must be noted that section 6, Act XI of 1865, specifies the suits cognizable by Courts of Small Causes, while section 15, Act IX of 1857, applies the Act to all suits of a civil nature within the pecuniary limit, except suits specified in the second schedule, and subject to the provisions of any Act for the time being in force.

In (8) a Full Bench upheld (6).

In 80 P. R. 1898 (1) a Division Bench held, that a ferry such as that at Khushalgarh must be regarded as immovable property vested in the Local Government and that a plaintiff, when claiming as lessee to recover ferry tolls or dues, claims to recover by reason of an interest in immovable property transferred to him by Government, and that the suit is excluded by article 13 of the Small Cause Court Act of 1887 from the jurisdiction of a Small Cause Court. The facts dealt with are clearly distinguishable from those of the present case and the sums claimed were dues in respect of the use of immovable property.

The weight or authority is, in my opinion, very much on the side of the present suit being a small cause, and the preliminary objection, that no appeal under section 70 (1) (b) lies, must be allowed.

Precedents (1) (2), (4) and (5) are very directly in point, and articles (11) and (12) of the schedule are as inapplicable as article (13), the fact that of the amount in suit Rs. 62-10-0 are claimed as income of the *jagir* in the hands of the manager not placing the suit on a footing differing from that occupied by the suit dealt with in the 21 Bom. case.

The question whether section 70 (1) (a) of the Courts Act is applicable remains.

Counsel for the appellants contended that the lower appellate Court had ignored a mass of documentary evidence

(1) 80 P. R. 1898 (*Desa Singh v. Narain Das*).

and precedents supporting the contention that the *dastur-ul-aml* of the Amritsar Golden Temple governs the Tarn Taran Darbar Sahib and cited *Greedharee Das v. Nandkishore Das* (1) where it was remarked (p. 428): "It is to be observed that the only law as to these *mahants* and their offices, functions and duties is to be found in custom and practice, which is to be proved by testimony"; and 106 P. R. 1908 (2), in which it was held that where a Court ignores important documentary evidence or places upon it a perversely erroneous interpretation, it acts with material irregularity within the terms of section 70 (1) (a).

I see no reason for holding that the lower appellate Court has ignored, or placed a perversely erroneous interpretation upon any evidence cited and mere misinterpretation of documents or error of law does not justify interference under section 70 (1) (a).

I dismiss the appeal with costs and I decline to interfere under section 70 (1) (a). The fact that the pecuniary limit for interference under section 70 (1) (b) in small causes is Rs. 1,000, while under the Code of Civil Procedure the pecuniary limit for second appeal in small causes is Rs. 500 only, does not extend the power to interfere under section 70 (1) (a) beyond the limits prescribed by that sub-section.

Appeal dismissed.

— — —
Privy Council.

No. 21.

Present:—

Lord Macnaghten.

Lord Mersey.

Lord Robson.

Sir Arthur Wilson.

Mr. Ameer Ali.

BUR SINGH AND OTHERS—(DEFENDANTS)—APPELLANTS.

Versus

UTTAM SINGH AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Will—execution of—Testamentary capacity—Testator's illness—Undue influence—Evidence—Burden of proof

Held, that the onus of proving the Testamentary capacity of the Testator lie on those by whom the will is propounded.

(1) (1886-67) 11 M. I. A. 405.

(2) 106 P. R. 1908 (*Ghulla Singh v. Sundar Singh*).

Held also, that when the evidence produced is found to have discharged that onus, such evidence is not displaced by mere proof of serious illness and of general intemperance of the testator.

Held further, that circumstances of the character that there was motive and opportunity for the exercise of undue influence by the relatives who attended the testator at the time of his illness and that some of them benefited by the will to the exclusion of other relatives of equal or nearer degree, sometimes suggest suspicion and would lead the Court to scrutinise with special care the evidence of those who propounded the will, but in order to set the will aside there must be clear evidence that undue influence was in fact exercised or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property.

Appeal from the decree of the Chief Court, Punjab (Hon. Mr. Justice Rattigan and Hon. Mr. Justice Lal Chand) dated the 17th June 1907.

[The following portion of the judgment of the Chief Court is sufficient for the purposes of this report, Ed.]

The next question is whether Shib Singh executed the will of the 11th June 1898 voluntarily and with full knowledge of its contents and consequences.

It may at once be conceded that the will was actually executed by Shib Singh and we see no reason to doubt the evidence of the Reverend Mr. Chatterji and Dr. Datta that on the day when the testator signed the will he was in his senses or in other words, that he was not unconscious or wandering in his mind. This much may be admitted. But it by no means follows from this that the will was voluntarily executed. On the contrary, from the evidence on the record we are satisfied that at the time, when the will was made, the testator was in a condition which rendered him powerless to withstand the influence of Bur Singh and Jowala Singh. He was practically at death's door, and he had been removed to the house of a Muhammadan, one Talamand. The evidence of Lala Narain Das (paper book p. 14) and Mian Beli Ram (paper book p. 15) shows that he was at this time in an utterly helpless condition, and it is not denied that Talamand, in whose house he spent his last days on earth, refused to sign the will as a witness. All this time Bur Singh and Jowala Singh were in close attendance upon him and it is not strange therefore, that they eventually succeeded in getting him to agree to anything they suggested. The unfortunate man was probably ready to agree to anything provided he was left in peace, and he therefore was prevailed upon to sign a will leaving the whole of his property to whom-

soever it might please these two persons to assign it. But even under these circumstances he does seem to have objected to the proposal to leave his wife Mussammat Charan Kaur, practically penniless. But with this last effort to do something for his wife, his will gave way and as regards all other matters he was not in a position to gainsay Bur Singh and Jowala Singh. There was no reason whatever why he should select Bur Singh as the one of his reversioners who was entitled to special consideration. It is no doubt alleged that Bur Singh and his grandfather, Ram Singh, rendered services to the deceased, but of these alleged services there is no real proof. The oral evidence on the point is of the vaguest possible kind and therefore of no value. Nor is it very clear how a young man, such as Shib Singh, would be in need of such services. On the other hand there is ample documentary evidence to show that until he was helpless and on his dying bed, Shib Singh was by no means friendly disposed towards Bur Singh. In 1894 there was such enmity between Shib Singh and Bur Singh that they were both called upon to give security to keep the peace (see paper-book, Page 59). In 1896 Bur Singh was the principal plaintiff in the suit brought by the reversioners to have one of his alienations declared null and void, and on the 4th March of that year Bur Singh, when cross-examined on behalf of Shib Singh, had to admit that on the death of Mussammat Jas Kaur, Shib Singh's sister-in-law, for whom Bur Singh acted as agent, Shib Singh had his house searched with a view to finding sundry articles, which Shib Singh alleged, had been stolen by Bur Singh. He also admitted that he had brought a criminal case against Shib Singh's servants. Admittedly, therefore, up to 1896 the deceased and Bur Singh were on the very worst possible terms and there is no evidence whatever to show that this hostility suddenly came to an end and that the two became so entirely reconciled that Shib Singh of his own free accord elected to leave his property partly to his alleged adopted son, Harbans Singh and partly to Bur Singh and Bur Singh's brother, Tara Singh. Assuming for the sake of argument that Bur Singh's grandfather, Ram Singh, looked after Shib Singh when the latter was a mere youth at School, we still fail to find any reason why Shib Singh, had he been a free agent, should have gone out of his way, on his death bed, to specially favour that one of his collaterals with whom he had during his lifetime been at bitter enmity. The witnesses who say that Bur Singh rendered services to Shib Singh give no details as to time and place, and obviously it was not necessary to show that after

1896 (when the two were on the most hostile of terms) a reconciliation took place and that Bur Singh's conduct towards the deceased so entirely changed that he who had been an enemy became a violent partisan, of the deceased and remained so up to the date of the latter's death. Of course, once Shib Singh became utterly helpless and incapable of exercising his own free will, it is quite possible—indeed it is proved,—that Bur Singh and his friend Jowala Singh, took entire charge of him for purposes of their own. This, however, is a very different thing from saying that Bur Singh was the one collateral whom Shib Singh was anxious, when in possession of his full faculties, of benefitting after his death. In our opinion, Shib Singh at the time when he executed the will (a few days before his death) was in an utterly helpless condition and completely at the mercy of Bur Singh and Jowala Singh. He was a mere tool in their hands and the so called will was the will, not of the person who signed it as testator, but of the two persons who took advantage of his helplessness to force or induce (it matters not which) him to execute it for their benefit.

For the reasons given we hold that the adoption of Harbaus Singh is not proved and that the will signed by Shib Singh was not executed by him of his own free accord. We accordingly accept the appeal and reversing the decree of the lower Court, we grant plaintiffs the relief for which they pray.

The Judgment of their Lordships was delivered by Lord Robson.

2nd Dec. 1910.

The main question in this Appeal is, as to the validity of the will of one Shib Singh, who was a Hindu Jat, residing at Garhdiwala in the District of Hoshiarpur in the Punjab.

There is a further point as to whether a portion of the land comprised in the will is ancestral property or not. That question is substantially one of fact. Both the Courts below are agreed in finding that the property in dispute was acquired, and no reason has been shown to their Lordships which would justify them in coming to a different conclusion.

Shib Singh fell seriously ill in May 1898: The will in dispute was made by him on the 11th June 1898 and he died on the 23rd of the same month. It is alleged by the Respondents in their plaint that the will was executed when "he was seriously ill, weak—really at death's door—and not in possession of his right senses and intellectual powers, and was under the undue influence of Jawala Singh, father of the Defendants, Harbaus Singh and Bur Singh."

None of the Judges had the advantage of seeing the witnesses as the evidence was taken wholly on deposition before the trial. There was very little conflict of evidence on the particular facts alleged, so far as those facts were material to the making of the will or the condition of the testator, and the only question for the Courts was whether, on such facts, the charges of testamentary incapacity and undue influence had been established.

Shib Singh was brought from Garhdiwala to Hoshiarpur for medical treatment on the advice of Mr. Chatterji, a mission teacher with whom he was acquainted, and was placed under the care of two doctors. He was accompanied by his relative, the defendant Bur Singh and his brother-in-law Jawala Singh. His physical condition became, no doubt, rapidly worse, and he, or someone about him, sent for his lawyer Pundit Jagan Nath, in order to take instructions for his will. This gentleman gave evidence for the Appellants. He was an old friend and schoolfellow of the testator, and had been his counsel in practically all his litigation. He took his instructions from Sahib Singh himself, and visited him for that purpose on several occasions before the day on which the will was executed. It cannot be said that, so far as the relationship of the beneficiaries to the testator is concerned, there was anything unnatural or unusual in the will. An allowance for maintenance was made to the wife; certain property was left to the defendants Bur Singh and Tara Singh, who were relatives and whose grandfather is stated to have had care of Shib Singh when the latter was a boy and to have rendered him important services. The remainder of the property went to his nephew, Harbans Singh, who had been born in Shib Singh's house and brought up by him, he himself being childless.

The will was dictated by the Pandit Jagan Nath (in the presence of Shib Singh) to a petition writer, Madho Ram, who knew Shib Singh, Dr. Datta and several zemindars were also present. While the dictation was going on Shib Singh made various observations on the clauses, and some alterations were made at his suggestion in the draft; for instance, he increased the provision for his wife. Dr. Datta afterwards read the completed document over to him and satisfied himself by questions that he understood it, and it was duly signed. Jagan Nath had previously sent for the Registrar to have the will registered, but the Sub-Registrar had come and gone before the will was

signed, and in the course of conversation on this subject Shib Singh said he was under the treatment of doctors and he would have it signed by them. On the following day, therefore, both doctors signed it, and, according to the custom of their profession in India in such cases, they added a statement of their opinion that the testator, though ill, was in his senses. Dr. Datta gave evidence at the trial in favour of the will, but Dr. Duni Chand had in the meantime died.

It would be difficult to have a stronger *prima facie* case in favour of the will, and it was fully accepted by the District Judge. The Chief Court also say that they "see no reason to doubt the evidence of the Rev. Mr. Chatterji and Dr. Datta that on the day when the testator signed the will he was in his senses, or in other words, that he was not unconscious or wandering in his mind" but they are of opinion that he was "in a condition which rendered him powerless to withstand the influence of (the defendants) Bur Singh and Jawala Singh," who were in close attendance upon him, and in whose hands the Chief Court think that "he was merely a tool." They add that in their opinion those defendants "took advantage of the testator's helplessness to force or induce him to execute it for their benefit." Their Lordships are unable to find any evidence on the record which would justify this conclusion.

The testator had been a man of intemperate habits, and was within 12 days of his death when the will was made; but there is no evidence to indicate that he was not sober, or not of a sound disposing mind when he was transacting the business of his will on the 11th June. Nor is there any evidence whatever that the Defendants Bur Singh and Jawala Singh used the undue influence which is alleged, beyond the bare fact, that they were the relatives who accompanied Shib Singh to Hoshiarpur, and were selected by him for benefits under the will.

It is stated that up to 1896 Bur Singh and Shib Singh were at enmity, and that there were open quarrels and litigation between them. That does not appear, however, to have prevented the testator from afterwards employing Bur Singh in the management of his lands, or from sharing his table with him. The District Judge finds that Bur Singh's services to the testator are proved both from documents and from the oral evidence of very respectable witnesses. These old family quarrels do not therefore, of themselves, show that Bur Singh could not have been a person whom the testator desired to benefit.

It was alleged on the part of the Defendants that Harbans Singh had been duly adopted by Shib Singh as his son, and the District Judge found this adoption proved. The Chief Court differed from him on this point, and drew some inferences unfavourable to the Defendants' case generally from the fact that the allegation had been put forward. It is unnecessary for their Lordships to decide the question of adoption, but they are of opinion that the evidence given in relation to that question gives rise to no material reflection on the evidence of the independent witnesses in support of the will. The Chief Court treat the evidence of Jagan Nath as not quite "beyond criticism," because in their opinion, he acted in the matter of the will as though he were ignorant of facts disclosed in previous proceedings relating to the position of Harbans Singh and Bur Singh, which it was thought probable he would remember, but they do not go so far as to reject or discredit his testimony. Indeed Jagan Nath was not cross-examined on these points, and there is really nothing in them which is not susceptible of explanation without reflecting in any way on his independence and good faith as a witness.

With regard to the Rev. Mr. Chatterji it was suggested apparently as a circumstance of suspicion against him that he had at one time bought a piece of land for his mission from Shib Singh; but there is nothing to show that the transaction was not a normal and perfectly proper matter of business.

No suggestion is made against the good faith of the doctors or of Mahdo Ram.

The *onus* of proving the testamentary capacity of Shib Singh of course lies on those by whom the will is propounded and in their Lordships' opinion they have discharged that obligation by the evidence indicated above. Such evidence is not displaced by mere proof of serious illness and of general intemperance, and yet that is as far as the evidence of the Respondents can fairly be said to go. So far as the charge of undue influence is concerned, all that is shown on the part of those attacking the will is, that there was motive and opportunity for the exercise of such influence by the Defendants, and that some of them in fact benefited by the will to the exclusion of other relatives of equal or nearer degree. Circumstances of that character may sometimes suggest suspicion and would certainly lead the Court in the present case to scrutinise with special care the evidence of those who propound the will; but in order to set it aside there must be clear evidence that the undue influence was in fact exercised, or

that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property.

Such evidence is not only lacking in this case, but, in the opinion of their Lordships, the circumstances attending the making and execution of the will are not reasonably consistent with it.

Their Lordships will therefore humbly advise His Majesty that this Appeal should be allowed with costs, and the Judgment of the Chief Court set aside and that of the District Court restored with costs in both Courts.

Appeal accepted.

No. 22.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

MAHANT KIRPA SINGH—(DEFENDANT)—APPELLANT
Versus

MAYA RAM (PLAINTIFF)
MUSSAMMAT JAI KAUR AND OTHERS } RESPONDENTS.
(DEFENDANTS)

Civil Appeal No. 357 of 1910.

Custom—Pre-emption—Lahore City—Mohalla Sathan—house converted into a Dharamsala subsequent to sale—Punjab Pre-emption Act II, of 1905, section 13 (2).

Held, that a custom of pre-emption in respect of houses exists in Mohalla Sathan in the city of Lahore.

Held also, that where at the date of sale the property sold was a house and subsequently it was converted into and used as a Dharamsala, it is immaterial for the purposes of sub-section 2, of section 13 of the Punjab Pre-emption Act to consider such conversion, inasmuch as it is the character of the property sold at the date of sale which determines the question of the applicability of the said sub-section.

Further Appeal from the decree of H. P. Tollinton, Esquire, Divisional Judge, Lahore Division, dated the 28th January 1908.

Oertel and Sohan Lal for appellant.

Dawarka Das for respondent.

The Judgment of the Court was delivered by —

25th Nov. 1910.

SHAH DIN, J.—This appeal and civil appeal No. 555 of 1908 are cross-appeals and will be disposed of by one judgment.

The suit, out of which these appeals have arisen, was brought by the plaintiff Maya Ram for possession by pre-emption [of a house situate in Mahalla Sathan in the city of Lahore which had been sold under a registered deed, dated the 8th January 1906, to the defendants, Mussammatt Jai Kaur and Bhai Sawan Singh, for Rs. 1,300. The plaintiff's suit was resisted by the vendees on various grounds, which it is unnecessary to set out at this stage of the proceeding. The main pleas taken were:—

(1) That the custom of pre-emption did not prevail in Mahalla Sathan in which the house in dispute is situate ;

(2) that the plaintiff had no right of pre-emption in respect of the property in dispute ;

(3) that the price entered in the sale-deed was fixed in good faith and was paid in full.

Upon the pleadings of the parties nine issues were framed by the first Court, and it held—

(1) that the custom of pre-emption prevailed in Mahalla Sathan ;

(2) that the plaintiff had failed to prove that he could claim pre-emption on the ground of vicinage ;

(3) that the house in dispute, having been purchased for the purpose of being converted into a Dharamsala and having been so converted within one month from the date of the purchase, could not be made the subject of pre-emption ;

(4) that the price entered in the sale-deed had not been fixed in good faith, and that its market value was Rs. 1,117-11-0. Upon these findings the plaintiffs' suit was dismissed.

On appeal by the plaintiff-pre-emptor the Divisional Judge held, disagreeing with the first Court—

(1) That as the plaintiffs' house touched the house in dispute at the back, he was entitled to pre-emption on the ground of adjacency, and

(2) that as at the time of sale the building in dispute was not a Dharamsala but a house, the mere fact that it was converted into a Dharamsala subsequently did not extinguish the plaintiff's right of pre-emption in respect of it.

The learned Judge further found, that the market value of the house was, as held by the first Court, Rs. 1,117-11-0, and he disallowed the value of the alleged improvements amounting to Rs. 60 effected by the vendees since

the date of sale. The Divisional Judge accordingly decreed the plaintiffs' claim conditional on payment of Rs. 1,117-11-0 by the plaintiff.

The plaintiff and the vendees have preferred further appeals to this Court. The plaintiff's appeal (No. 555 of 1908) relates only to the question of the market value of the house, which it is contended is not more than Rs. 800, while the vendees appeal (No. 357 of 1908) impugns all the findings recorded against them by the Lower Appellate Court. In connection with this latter appeal Mr. Oertel has contended before us—

(1) that the custom of pre-emption is not proved to exist in Mohalla Sathan,

(2) that as the building in dispute was purchased for the purpose of being used as a Dharamsala and was so used immediately after the purchase was made, under section 13, sub-section 2 of the Punjab Pre-emption Act no right of pre-emption can exist in respect of it,

(3) that if the plaintiff had a right of pre-emption, he must pay Rs. 1,300 which it is urged is the market value of the house in suit,

After hearing Mr. Oertel we think that none of these three contentions has any force, and that the findings arrived at by the Lower Appellate Court are correct. As to the first contention, it is noteworthy that, before the sale in dispute was actually made, the vendors served the plaintiff with a notice saying that as he had a right of pre-emption in respect of the house in question he was at liberty to purchase it, failing which they would sell it to the present vendees. This notice shews that the plaintiff's right of pre-emption was fully recognised by the vendees. Apart from this, however, there are on the record no less than six Judicial decisions which prove the existence of the custom of pre-emption in Mahalla Sathan, in which admittedly the house in dispute is situated, and there is not one single instance in which in any pre-emption suit it was held by a court of justice that the custom of pre-emption did not exist in the said Mahalla. We have therefore no hesitation in overruling the first contention.

The second contention was not very seriously pressed, and it could not well be pressed, considering that under sub-section 2 of section 13 of the Punjab Pre-emption Act the plain-

tiff's right of pre-emption obviously did exist in respect of the building in dispute, if at the time of the sale thereof, it was not a Dharamsala but a house. If at the date of sale it was a house, it was perfectly immaterial for the purposes of the said sub-section whether subsequently to that date it was or was not converted into and used as a Dharamsala. It is the character of the property sold at the date of sale which determines the question whether sub-section 2 aforesaid applies to it or not, and it is not disputed by Mr. Oertel that at that date the building in dispute was a house and not a Dharamsala. The second contention also therefore fails.

As regards the third contention, it is not disputed that the payment of Rs. 1,300 to the vendors is not proved. That being so the market value of the house had to be ascertained. A competent local Commissioner was appointed to assess the value of the house and his report that the value was Rs. 1,117-11-0 has been accepted by both the Courts as correct. The value of the alleged improvements by the vendees has, we think, been rightly disallowed, as those improvements were made in spite of a written protest by the pre-emptor. We therefore overrule the third contention.

As a result of the above findings this appeal is dismissed with costs.

We now come to the Cross-Appeal No. 555 of 1908. Lala Dwarka Das for the pre-emptor tried to find fault with the market value of the house as assessed by the local Commissioner on the ground that the rates of building material upon which that value was based were those current at the time when the report was made and not at the time of the sale. He urged that between the date of the sale (January 1906) and the date of the local enquiry (August 1907) the rates in question must have risen considerably and that therefore the sum of Rs. 1,117-11-0 could not represent the correct market value of the house at the date of the sale. The alleged rise in the rates was not, however, expressly made the subject of objection to the Commissioner's report in the first Court, and we cannot make such an assumption in favour of the pre-emptor. Both the Courts below have concurred in accepting the local Commissioner's estimate as correct and no sufficient reason has been shewn why we should disturb that concurrent finding. We accordingly

maintain the decree of the Lower Appellate Court and dismiss this cross-appeal with costs.

Appeal dismissed.

No. 23.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Shah Din.

**RAHIM BAKHSH AND OTHERS—(PLAINTIFFS)—
APPELLANTS,**

Versus

NATHA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 693 of 1908.

Custom (Alienation)—Tarkhans, Sialkot District—Gift of ancestral land in favour of daughter valid to extent of one-twentieth only—onus probandi—Riwaj-i-ams 1865 and 1892 discussed.

Held, that the defendants (donees), on whom the *onus* lay, had failed to prove that among Tarkhans (carpenters) of Kotli Tarkhanan, tahsil Zafarwal of the Sialkot District by custom, a male proprietor is competent to gift more than a one-twentieth share of his ancestral land in favour of his daughter to the prejudice of his collaterals of the 5th degree.

The relative value of the *Riwaj-i-am* of 1865 and of that of 1892 discussed.

Further Appeal from the decree of Sheikh Asghar Ali, Additional Divisional Judge, Sialkot Division, dated the 6th March 1908.

Gullu Ram, for appellants.

Jalal-ud-Din, for respondents.

The judgment of the Court was delivered by —

10th Feb. 1911.

SHAH DIN, J.—Natha, a *tarkhan* of mauza Kotli Tarkhanan, tahsil Zafarwal, Sialkot District made a verbal gift of 55 *kanals* 6 *marlas* of his ancestral land to his daughter, Mussammat Ramzan Bibi, in June 1900, and mutation in respect of that gift was sanctioned in January 1902. After the death of Mussammat Ramzan Bibi, the said land was mutated in favour of her minor son, Ghulam Hyder, in June 1904. The suit out of which this appeal has arisen was brought by the plaintiffs-appellants, who are Natha's collaterals in the 5th degree, for a declaration that the gift made by Natha in favour of his daughter, on the strength of which mutation of names was effected after her death in respect of the land in question in favour of her son, Ghulam Hyder, shall not affect their rights of reversion after the death of Natha.

The Court of first instance held that the gift in dispute was valid only to the extent of a one-twentieth share of the land, and

it accordingly granted to the plaintiffs the declaration prayed for except as regards the one-twentieth share of the property gifted. On appeal the learned Divisional Judge held that the plaintiffs had failed to prove that by custom, applicable to the parties, Natha was competent to gift his ancestral land to his daughter, and he therefore accepted the appeal and dismissed the plaintiff's suit *in toto*.

A further appeal has been preferred to this Court by the plaintiffs, and we have heard the case fully argued on both sides. The oral evidence produced by the parties in the first Court is practically of no value, as beyond giving their own opinion in favour of the position taken up by the party that summoned them, the witnesses for the plaintiffs or those for the defendants give no instances to show either, on the one hand, that gifts to daughters similar to the one in dispute have been made and disallowed in the parties' tribe or, on the other hand, that such gifts having been made without the consent of the collaterals have been maintained after contest. The oral evidence on both sides may therefore be disregarded.

Coming now to the documentary evidence on the record, we find that the plaintiffs produced three copies of judgments which are referred to in detail in the judgment of the Divisional Judge, but it is now conceded before us that none of those judgments helps the plaintiffs so far as the alleged invalidity of the gift in dispute is concerned. The defendants, on the other hand, produced copies of three mutation entries, which are also noticed in the Divisional Judge's judgment, but these also do not throw much light upon the point at issue. From the statement of the Sadr Kanungo it would appear that Hassan, to whom Pira, Lohar, of *tahsil* Pasrur, had made a gift of his land and to which the mutation order of the 20th September 1899 relates, was a daughter's son of the donor. But beyond this one fact, other particulars which would render the instance one of relevant value in this case are not forthcoming; and this instance, therefore, may safely be disregarded.

On behalf of the defendants, reliance has been placed upon the *Wajib-ul-arz* of the village prepared in 1855, as also upon the *Riwaj-i-am* of the Sialkot District compiled in the settlement of 1865; while, on the other hand, the plaintiffs' counsel lays great stress upon the *Riwaj-i-am* of 1892, which he claims to be in his favour and which, he urges, has been accepted as a correct record of custom in three published decisions of this

Court, namely, 16 *P. R.* 1896 ⁽¹⁾, 85 *P. R.* 1900 ⁽²⁾, and 17 *P. R.* 1904 ⁽³⁾. We have referred to the *Wajib-ul-arz* and to the *Riwaj-i-ams* in question, and have also examined the above mentioned decisions of this Court; and we think that the balance of authority is decidedly in favour of the position taken up by the plaintiffs, namely, that a male proprietor among the Tarkhans of the Sialkot District is incompetent by custom to gift more than a one-twentieth share of his ancestral immovable property in favour of his daughter to the prejudice of his collaterals of the 5th degree.

The *Wajib-ul-arz* of 1855 provides that in the presence of sons a father can gift a portion of his property (*kuch jaidad apni*) to his daughter, and that after her death her descendants will retain possession of the property gifted. The *Riwaj-i-am* of 1865 says that in default of collaterals in the 3rd degree a sonless proprietor can make a gift of the whole of his property to his daughter, and in support of this provision is cited an instance of one Waris, a Lohar Tarkhan of *tahsil* Pasrur, having given his property to his daughter in his own lifetime, though it is not stated whether Waris had any collaterals at all, and whether, if he had collaterals, they did or did not consent to the gift. The *Wajib-ul-arz* of 1855 does not help the defendants as it does not authorize the giving away of the whole of his property by a male owner to his daughter and it is admitted that Natha, defendant, gifted the whole of his ancestral land to Musammat Ramzan Bibi. The exact proportion of the property which can be given to a daughter by a male proprietor is not specified in the *Wajib-ul-arz*, but the *Riwaj-i-am* of 1892, on which reliance is placed by the plaintiff's counsel, does fix the proportion, by providing that a father can gift only a one-twentieth share of his ancestral property to his daughter. See answers to questions 84, 86 and 88 in the Customary Law of the Sialkot District compiled by Captain Dunlop-Smith in 1895, pages 26 to 28.

The last mentioned *Riwaj-i-am* has been considered by this Court as a thoroughly reliable record of custom, and greater weight has therefore been attached to it than to the *Riwaj-i-am* of 1865. In No. 16 *P. R.* 1896 ⁽¹⁾, in which the parties were Mahomedan Goraya Jats of the Daska *Tahsil* of the Sialkot District, it was held, following the *Riwaj-i-am* of 1892, that the

⁽¹⁾ 16 *P. R.* 1896 (*Hukam Din v. Musammat Hakim Bibi.*)

⁽²⁾ 85 *P. R.* 1900 (*Devi Ditta v. Musammat Hukmi.*)

⁽³⁾ 17 *P. R.* 1904 (*Gauhar v. Ghulam.*)

defendants upon whom the *onus* rested had failed to prove that a gift of ancestral land by a sonless proprietor in favour of his daughter was valid in the presence of near collaterals. In their judgment in that case the learned Judges remarked as follows:—

“The volume of Customary Law of the Sialkot District recently issued shows that the claims of daughters are not recognized to such an extent as they were in 1865, and in 1865 the exclusion of the daughters by the agnatic heirs was the rule and she could at the utmost obtain only a limited share of ancestral land in the presence of near collaterals. Apparently, there was then a feeling, as there is even now, that small gifts might be permitted, and the share allowed by Mahomedan Law was taken as a convenient standard. The present standard probably represents popular opinion more correctly.”

Though the plaintiffs in that case were near collaterals and the case is to that extent distinguishable from the present one, yet the fact remains that the *Riwaj-i-am* of 1892 was considered as more correctly representing popular feeling on the subject of gifts to daughters than that of 1865; and on this point the decision in question has been approved of and followed in two later judgments of this Court.

In 85 P. R. 1900 (1) it was held that a sonless Ghuman Jat of the Daska *Tahsil* could gift his ancestral property in favour of his daughter only to the extent of one-twentieth share in the presence of the collaterals of the 6th degree, No. 16 P. R. 1896 (2) was cited with approval as regards the correctness of the entries in the volume of Customary Law compiled by Captain Dunlop-Smith in 1895. In No. 17 P. R. 1904 (3) it was held that among Ghuman Jats of the Daska *Tahsil* a gift by a sonless proprietor of ancestral property in favour of his daughter was not valid by custom except as to the one-twentieth share thereof. No. 16 P. R. 1896 (2) and No. 85 P. R. 1900 (1) were followed; the *Riwaj-i-am* of 1865 was not approved of, whereas that of 1892 was held to be a correct record of custom.

We can see no sufficient reason in this case to differ from the view which this Court has held in the above mentioned decisions as regards the relative value of the *Riwaj-i-ams* of 1865 and 1892; and we hold that the defendants in this case

(1) 85 P. R. 1900 (*Devi Ditta v. Musammat Hukmi*.)

(2) 16 P. R. 1896 (*Bukam Din v. Hakim Bibi*.)

(3) 17 P. R. 1904 (*Gauhar v. Ghulam*.)

on whom the *onus* rested have failed to prove that by custom applicable to their tribe Natha was competent to gift to his daughter Mussammat Ramzan Bibi more than a one-twentieth share of his ancestral land.

We therefore accept this appeal and reversing the decree of the lower appellate Court, restore that of the Court of first instance with costs.

Appeal accepted.

No. 24.

Before Hon. Mr. Justice Chevis.

BAWA SINGH—(DEFENDANT)—PETITIONER,

Versus

LACHHMAN SINGH AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Revision No. 908 of 1909.

Amendment of decree—Civil Procedure Code, 1882, section 206—Appeal or revision from order amending decree—meaning of “Haqiyat.”

Held that no appeal lies from an order made under section 206, Civil Procedure Code, 1882, amending a decree not in conformity with the judgment, but that an appeal lies from the amended decree.

Held also, that an objection that the amended decree is not in conformity with the compromise, on which the decree is based, can only be taken in appeal from the decree and not in revision from the order amending the decree.

Held further, that the word “Haqiyat” means rights in immovable property and though used as a rule in connection with landed property, there is nothing to prevent its application to house property also.

Mailathi Auni v. Subbaraya Mudaliar ⁽¹⁾ dissented from—

Brojo Lal Rai v. Tara Prosanna Battacharji ⁽²⁾ followed.

Petition under section 70 (b) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the orders of Lala Gopal Das, Munsif 1st Class, Amritsar, dated the 17th August 1908, and 7th December 1908.

Roshan Lal, for petitioner.

Duni Chand, for respondent.

⁽¹⁾ (1901) 1, L. R. 24 Mad. 646.

⁽²⁾ (1905) 3 Cal. L. J. 188.

The judgment of the learned Judge was as follows:—

9th Feb. 1911.

CHEVIS, J.—In a case pending between the parties a written compromise was put in, according to which the plaintiffs were to take one-third of the land of the late Mala Singh, but out of that one-third defendants were to have 4 *kanals* of land of superior quality on account of expenses of the case; plaintiffs were also to get one-third of the house property.

The parties were then questioned on the terms of the compromise, and they confirmed it, as regards the land, but apparently no question was put to the defendants as regards the house property.

The judgment, dated 30th May 1905, which followed, was for one-third of the *haqiqat* of Mala Singh, deceased. The judgment went on to say that plaintiffs should take one-third of the land but out of it should give back 4 *kanals* of land of superior quality to the defendants.

The decree of the same date is merely for one-third of the landed property, less 4 *kanals*. The decree makes no mention of the house property.

On application for amendment the Court on 17th August 1908, amended the decree, extending it so as to include one-third of the house property.

The defendants apply to this Court for revision. A preliminary objection is raised that as the amended decree is open to appeal, no application for revision can be entertained.

Mailathi Auni v. Subbaraya Mudaliar ⁽¹⁾ certainly seems to support this objection, but *Nalinakshya Ghosal v. Mafuksher Hossain* ⁽²⁾ lays down that an order passed under section 206 of the Civil Procedure Code (Act XIV of 1882) amending a decree not in conformity with the judgment is not appealable. This last ruling is approved in a later Calcutta ruling, *Brojo Lal Rai v. Tara Prostanna Battarcharji* ⁽³⁾ which, however, goes on to say that an amended decree is appealable as a decree. The combined effect of the Calcutta rulings is, so I understand, that there is no appeal against the amendment itself, but that when a decree has been amended the amended decree may be attacked *on the merits* by way of appeal. There is also a Punjab ruling, 101 P. R. 1888 ⁽⁴⁾ which lays down that the mere order directing amendment is not a decree and is not appealable. This ruling in my opinion agrees with the Calcutta ruling, and so I follow the Calcutta ruling and not the

⁽¹⁾ (1901) I. L. R. 24 Mad. 646.

⁽³⁾ (1905) 3 Cal. L. J. 188.

⁽²⁾ (1901) I. L. R. 28 Cal. 177. ⁽⁴⁾ 101 P. R. 1888, (*Khan Shirin v. Nasir Khan.*)

Madras one, and hold that a revision lies in the present case and not an appeal.

The question on revision is whether the amendment of decree brings the decree into conformity with the judgment. For defendant it is argued that the judgment does not cover the house property and that the original decree was in accordance with the judgment and could not be amended. But the judgment awards plaintiffs one-third of the *haqiyat*, and after consulting my learned colleague, Shah Din, J., I am of opinion that the word *haqiyat* means *rights in immovable property*, and that though it is as a rule used in connection with landed property there is nothing to prevent its application to house property also. In the present case one-third of the house property was included in the plaint and also mentioned in the written compromise, and though the statements of defendants when questioned as to the compromise, contain no reference to the house property, it cannot be said that these statements contradict the written compromise so far as the house property is concerned; all that can be said is that the statements do not confirm the written compromise in this respect. So in my opinion the word *haqiyat* used in the judgment cannot be taken to cover the land alone. I am of opinion therefore that the judgment covers the house property also, and that the amended decree is, and the original decree is not, in conformity with the judgment. This application for revision must therefore fail

Counsel for defendants next argues that the judgment and amended decree are not in accordance with the compromise, and that the plaintiffs were not entitled to one-third of the house property according to the compromise. This is a matter on which I express no opinion; the plea that the decree does not accord with the compromise is an attack on the amended decree on the merits, and following *Brojo Lal Rai v. Tara Prosanna Battacharji* (1) I hold that the decree can be attacked on the merits only in appeal and not in revision.

I dismiss this application, but pass no order as to costs, as it seems to me that the whole trouble is due to the Court's omission to question all the parties as to that part of the written compromise which deals with the house property.

Revision rejected.

(1) (1905) 3 Cal. L. J. 188.

No. 25.

*Before Hon. Mr. Justice Shah Din and Hon. Mr.
Justice Chevis.*

UDHE SINGH AND OTHERS—(PLAINTIFFS)--APPELLANTS,

Versus

SARDAR BISHEN SINGH—(DEFENDANT)--RESPONDENT.

Civil Appeal No. 501 of 1909.

Specific Relief Act, I of 1877, section 21 (last clause)—Suit based on agreement containing a clause for reference to arbitration—not barred unless defendant proves that plaintiff refused to submit to arbitration.

In a suit based on a registered agreement containing a clause "If any dispute arises between the parties regarding this agreement it shall be settled by master N. B. and his decision shall be binding on the parties." Defendant raised a plea that the suit is barred by section 21 of the Specific Relief Act—

Held, that the defendant on whom the *onus* lay had failed to prove that plaintiffs had refused to perform the contract to refer the matter to arbitration before the present suit was instituted and that consequently the last clause of section 21 of the Specific Relief Act did not operate as a bar to the plaintiffs' suit.

First appeal from the decree of Shahzada Wa'a Gauhar, Additional District Judge, Ludhiana, dated the 4th March 1909.

Sheo Narain, for appellants.

Dawarka Das, for respondent.

The judgment of the Court was delivered by :—

SHAH DIN, J.--This appeal arises out of a suit brought by 21st Jan. 1911. the plaintiffs-appellants against the defendant-respondent for recovery of Rs. 5,295-7-3 on account of the rent of certain water-mills and the price of materials on the strength of a registered agreement, dated the 21st May 1907. That agreement contains a clause to the following effect :—

"If any dispute arises between the parties regarding this agreement, it shall be settled by master Nur Bakhsh, Municipal Commissioner, Ludhiana, and his decision shall be binding on the parties."

In answer to the plaintiffs' claim, the defendant raised several pleas, of which the most important plea, with reference to which the plaintiffs' suit has been dismissed, was that, as the plaintiffs had refused to abide by the agreement to refer the dispute between them to the arbitration of Nur Bakhsh, their suit was barred by section 21 of the Specific Relief Act.

In a rather confused judgment the lower Court held, with reference to the third and fourth issues, that the provisions of section 21 of the Specific Relief Act had not been complied with by the plaintiffs before instituting the present suit, and that therefore their suit was not maintainable.

In appeal it is urged by the learned counsel for the plaintiffs-appellants that it was for the defendant-respondent to prove affirmatively that the plaintiffs-appellants had, before bringing the present suit, refused to perform the contract to refer to arbitration, and that he had not discharged the *onus*. The learned pleader for the defendant-respondent has had to concede that the burden of proving that the plaintiffs had refused to perform the contract to refer to arbitration did lie upon his client.

* * * *

We are, therefore, constrained to hold that the defendant-respondent has entirely failed to prove that the plaintiffs-appellants had refused to perform the contract to refer the matter to arbitration before the present suit was instituted. That being so, the last clause of section 21 of the Specific Relief Act does not operate to bar the plaintiffs' suit, and the lower Court was clearly in error in dismissing it on the ground that it was so barred.

We therefore accept the appeal, and setting aside the decree of the lower Court, remand the case under Order XLI rule 23, of the Civil Procedure Code, for decision on the merits.

The stamp on this appeal will be refunded, and other costs will be costs in the cause.

Appeal accepted : case remanded.

Full Bench.**No. 26.**

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, Hon. Mr.
Justice Kensington and Hon. Mr. Justice Rattigan.*

SUNDAR—(DEFENDANT)—APPELLANT,*Versus*

SALIG RAM AND OTHERS—(PLAINTIFFS)—
AND OTHERS—(DEFENDANTS)— } **RESPONDENTS.**

Civil Appeal No. 1210 of 1910.

Indian Limitation Act, IX of 1908, section 2 (8), Schedule II, articles 140, 141, 142 and 144—Adverse possession—Alienation by widow not challenged by nearest reversioner—Suit for possession by remote reversioner after death of nearest reversioner.

The last male owner of agricultural land died leaving a widow, who died in 1876, and a mother, who died in 1892. The widow had alienated part of the land and had placed the alienee in possession. The alienation was not for necessity. The nearest reversioner B., great grandson of K., the great grandfather of the last male owner, died in 1903, without challenging the alienation or expressly assenting to it. The descendants of the brother of K. sued in 1909 the heirs of the alienee for possession of the land alienated. The question submitted to the Full Bench was whether plaintiffs' suit was within time.

Held, following the principles underlying No. 18 P. R. 1895 F. B. ⁽¹⁾ and dissenting from No. 106 P. R. 1906 ⁽²⁾ that the claim was not barred under article 144 of the Limitation Act, 1908, inasmuch as the plaintiffs' right to sue for possession was not derived from or through B (*vide* definition of "plaintiff" in section 2 (8) of the Act), and consequently the defendants' possession, though adverse to B., could not be adverse to the plaintiffs until after his death, when their right to possession accrued.

Held also, that articles 140 and 141 had no application to the case.

Further appeal from the decree of J. P. Thompson, Esquire, Divisional Judge, Hoshiarpur Division, dated the 17th June 1910.

Sukh Dial, for appellant.

Sheo Narain and Tek Chand, for respondents.

The judgment of the Full Bench was delivered by—

RATTIGAN, J.—The learned Chief Judge has referred the following question to this Full Bench for determination, *viz.* :— 30th Jan. 1911.

"The last male owner of agricultural land died leaving a widow who died in 1876, and a mother who died in 1892.

⁽¹⁾ 18 P. R. 1895 F. B. (*Roda v. Harnam*).

⁽²⁾ 106 P. R. 1906 (*Kaka v. Labh Chand*).

“ The widow had alienated part of the land and had placed the
“ alienee in possession.

“ The alienation was not for necessity.

“ The nearest reversioner Badri, great grandson of Kirpa,
“ the great grandfather of the last male owner, died in 1903,
“ without challenging the alienation or expressly assenting to
“ it. The descendants of the brother of Kirpa sued in 1909
“ the heirs of the alienee for possession of the land alienated.
“ Was their suit within limitation ? ”

The learned Divisional Judge had held that the claim was within time, and it consequently devolved upon Mr. Sukh Dial, advocate for the defendants, to address us in support of the argument that the suit was barred by limitation. Mr. Sheo Narain, on behalf of the respondents, supported the conclusions of the Divisional Judge.

In my opinion, the answer to the question put to us must be in the affirmative. I start with the admission that plaintiffs are the collateral heirs of the last male owner, and that in the ordinary course of things, they would be entitled to claim possession of an estate which was originally held by an ancestor common to them and such last owner. It is, however, urged that their rights are now extinguished under the provisions of the Indian Limitation Act, IX of 1908, because the possession of the defendants became adverse to Badri the next reversioner on the death of the last owner's mother in 1802, and that such adverse possession is no less effective in law against them than it was against Badri.

There is distinct authority in support of this view, for a Division Bench of this Court has held in No. 106 P. R. 1906, (1) that “ a person who has held possession of agricultural land
“ adversely against the next reversioner of a deceased proprietor
“ is competent to set up such adverse possession against the
“ more remote reversioners, the cause of action in such a case
“ accrues on the death of the deceased proprietor and not on
“ the death of the next reversioner.”

So far as I know, this is the only *direct* authority upon the question which we have to determine, and I need hardly say that in venturing to differ from it, I do so with the greatest respect and deference. But after careful consideration of the judgment of the learned Judges (Robertson and

(1) 106 P. R. 1906 (*Kaka v. Labh Chand*).

Chitty JJ.) and of the arguments of Mr. Sukh Dial I am impelled to hold that the decision in that case was erroneous.

It is a trite proposition that statutes of limitation must be strictly construed and that no man is to be deprived of rights which would by law belong to him unless the specific provisions of law, which are alleged to take away these rights can be shewn to apply clearly and in precise terms to his case. In the words of Chatterji, J. (in No. 56 P. R. 1903 (1) at page 259) "The law of limitation must be strictly construed, "i.e. its scope cannot be stretched to extend to cases not covered by its language, and, when the indications as to its application are not clear, the construction must be in favour of the right to proceed."

Now in the present case it is admitted (and indeed, it could not be contested) that (1) Badri's right to possession accrued only in 1892 when the mother of the last owner died, (2) that so long as Badri lived, the present plaintiffs were not entitled to claim possession of the estate, and (3) that even if the present plaintiffs had during the lifetimes of the widow or the mother of the alienor obtained a declaratory decree to the effect that the alienation in favour of the defendants would not affect their reversionary interests, such declaratory decree would not have availed them against a plea of adverse possession. Bearing these admissions in mind we find that (upon the contention of Mr. Sukh Dial) the legal rights of plaintiffs would be by law extinguished, despite the fact that the latter could not, during Badri's lifetime by any means in their power, assert these rights with the object of preventing defendants from setting up a plea of adverse possession against them. *Per se* this would seem to be a fatal flaw in Mr. Sukh Dial's argument, for it is a well recognised principle of law that possession cannot be adverse against a person who has not (either on his own account or through his predecessor in title) an immediate right to possession, see *Bejoy Chunder Banerjee v. Kally Proscanno Mookerjee* (2), and *Taru Bai v. Venkat Rao* (3). Mr. Sukh Dial recognising this difficulty, has contended that Badri who unquestionably became entitled to possession in 1892 was the predecessor in title of the plaintiffs, and that as the defendants held adversely to Badri from that date up to 1903 when Badri died, the present suit must

(1) 56 P. R. 1903 (*Dheru v. Sidhu*.)

(2) (1878) I. L. R. 4 Cal. 327.

(3) (1903) I. L. R. 27 Bom. 43 (51).

be held to be barred either under article 140 or article 141 or article 144 of the Limitation Act.

Articles 140 and 141 are, in my opinion, clearly inapplicable to plaintiffs' claim. They certainly were not entitled themselves to claim possession, when the mother died in 1892, nor did the estate at that time fall into *their* possession. It seems to me that the one and only ground upon which their claim can be held to be barred is that they are identified in interests with Badri and that adverse possession as against him would in law be adverse possession against them. To arrive at this conclusion, we must hold that the word *plaintiff* in article 144 includes in the present case not only Badri but the present plaintiffs, and that the latter are his heirs and derive their right to sue for possession from or through him (section 2 (8) of Act IX of 1908). Now Badri himself was undoubtedly entitled to possession in 1892 when the mother of Ranjha died. For the purposes of articles 140 and 141, he was the only person who could then claim possession. He did not sue for possession and in the words of the order of reference "neither challenged the alienation nor expressly assented to it." As long as he lived neither of the above articles could, by any stretch of language, be held applicable to plaintiffs. But when he died in 1903, plaintiffs forthwith became entitled to possession, and their claim can, in my opinion, be held barred only under article 144 and only if Badri can be so identified with them as to be held to be *plaintiff* with them, within the meaning of that article.

It seems to me that this question has been finally and definitely decided by the Full Bench decision of this Court which is reported as No. 18 P. R. 1895 (1). In that case the learned Judges observed :—

"We accept the view that the true description under the Customary law of the Province of a male holder of ancestral land is that he is a full owner with an interest transmissible to his heirs, lineal or collateral, but that the power of alienation is limited, and liable to be controlled by the heirs, lineal or collateral, as the case may be . . . From this it follows that on the death of a sonless owner the collateral heirs take the estate from him as his heirs, and derive their title to possession of the ancestral land from him and through him

(1) 18 P. R. 1895 F. B. (*Roda v. Harnam*).

“ to the common ancestor. . . . The next question is whether
“ the present suit falls under article 142 of the 2nd Schedule to
“ the Act. The only point which it appears to us necessary
“ to consider in this connection, is whether the plaintiff in
“ the present case can be identified with the last owner, the
“ donor of the land, by reason of the definition of the term
“ ‘ plaintiff ’ in section 3 of the Act; in other words, whether
“ the donor is a person from or through whom the present
“ plaintiff derives his right to sue. We have already expressed
“ our opinion that the present plaintiff does derive his right
“ to possession of the land in suit from or through the last
“ male owner. But does he derive *his right to sue* for posses-
“ sion from or through such person? In our opinion he does
“ not, inasmuch as his right to sue for possession, in spite
“ of the last owner’s act of alienation, is derived from no indi-
“ vidual but from the customary rule which places a restric-
“ tion upon the owner’s powers of disposition of ancestral
“ property, and renders him liable to be controlled in that res-
“ pect by his collateral heirs. . . . We must therefore fall back
“ upon article 144 of the 2nd Schedule of the Limitation Act
“ as the provision of law, applicable to the suit, and the ques-
“ tion to be determined under the article in the Act is, when
“ the possession of the defendant became adverse to the plain-
“ tiff, that is, by parity of reasoning, to the actual plaintiff
“ in the present case and not to the donor. Now assuming
“ (without deciding) that the defendant’s possession was from
“ its inception “ adverse ” to the donor, it seems to us that it
“ could not be at the same time adverse to the plaintiff *who*
“ *had no right to possession as long as the donor lived.* ”

The reasoning of the Full Bench appears to me to apply *a fortiori* to the present case, for if the reversioners, as the heirs of the owner, are not affected by a possession which was adverse to him on the ground, that so long as he lived, they had no right to claim possession, they cannot reasonably be held to be affected by possession adverse to an heir who is entitled to claim possession but does not do so, though so long as he lives he and he only has the right to possession. As the Full Bench point out, plaintiffs may be the heirs of Badri in the sense that their claim to possession is derived from or through him. But their right to sue for possession is not so derived and is an independent right. If Badri had in 1892 entered upon possession of the land and had thereafter alienated it by sale or gift to defendants, it is obvious, upon the authority of the Full Bench ruling, that plaintiff’s claim would

not have been barred under either article 142 or article 144. Surely defendant's position cannot be rendered stronger simply because Badri, instead of alienating the land by an express act on his part sleeps over his rights and allows the defendants indirectly to take possession of the same? It seems to me that the principles underlying the Full Bench decision apply with even greater force to the latter case, for in either event it must be kept in mind that so long as Badri lived, plaintiffs could have no right to claim possession. Speaking with every deference, I confess, I am doubtful whether the lineal or other heir to ancestral landed property can rightly be described for any purposes as the heir of the last male owner. It seems to me that his claim to such property is derived from the original or common ancestor who held the property, and not in any sense from, or even through, the last holder [see No. 107 P. R. 1887 F. B. (1)]. It is, I consider, upon this ground that a son or agnatic relation is held entitled to challenge alienations affected by the owner for the time being in possession and that ancestral immovable property cannot be so dealt with under section 88 of the Criminal Procedure Code as to affect the rights thereto of the holder's male lineal descendants or collaterals [18 P. R. 1908 F. B. (2)]. But be this as it may, there can be no question that the right of the latter *to sue for possession* is not derived from the last holder of the estate.

As I have observed above the only direct authority upon the question before us is No. 106 P. R. 1906 (3). But there are certain other authorities, indirectly relevant, to which I must refer. In certain cases it has been held that assent given by a father to an alienation effected by the person in possession (usually a female) will be binding upon his son, [see *inter alia*, Nos. 59 P. R. 1904 (4), 68 P. R. 1905 (5), 37 P. R. 1907 (6), 15 P. R. 1903 (7), 76 P. R. 1906 (8), 97 P. R. 1906 (9), 78 P. R. 1908 (10)]. But as pointed out by Robertson, J. in No 59 P. R. 1904 (4), this does not mean that the son, in such cases has not *ab initio* a right to sue.

(1) 107 P. R. 1887 F. B. (*Gajar v. Sham Das*).

(2) 18 P. R. 1908 F. B. (*Sadhu Singh v. Secretary of State*).

(3) 106 P. R. 1906 (*Kaku v. Labh Chand*).

(4) 59 P. R. 1904 (*Kaman v. Muhammad Ali*).

(5) 68 P. R. 1905 (*Indar v. Choki Ram*).

(6) 37 P. R. 1907 (*Devi Dial v. Uttam Devi*).

(7) 15 P. R. 1903 (*Labh Singh v. Gopi*).

(8) 76 P. R. 1906 (*Ganpat v. Dhuni Ram*).

(9) 97 P. R. 1906 (*Buta v. Khuda Baksh*).

(10) 78 P. R. 1908 (*Shib Ram v. Shib Singh*).

He certainly has a *locus standi* to institute the suit, and the utmost that can be said is that his claim will probably fail if it can be shown that his own father *bonâ fide* agreed to the alienation. Obviously this class of case cannot afford us any material assistance when we have to decide whether in a case such as the present, the claim of the plaintiffs is barred by *limitation*. The fact that Badri, and we may go further and say, Badri's sons and grandsons (if he had had any), had accepted the alienation, would undoubtedly weigh considerably with the Court when it came to decide whether or not the alienation was one which should be upheld. This might well be so, but that is a totally different matter from holding that by reason of Badri's active acquiescence in the alienation or his inaction with regard to it, plaintiff's suit is barred by Article 144 of the Limitation Act.

Personally I do not regard such authorities as in point for our present purposes. But even if they could be so regarded, I find that there are numerous authorities the other way. In No. 84 P. R. 1898 F. B. (1) for example, it was held that a son was entitled to contest an alienation by his uncle, despite the fact that his own father had refused to impeach the transaction. This was, of course, a suit for a declaratory decree. In the course of their judgment, the learned Judges remarked, "*plaintiff is in the line of heirs to Harnam Singh though his father would precede him in the succession if he was alive when it opened out*. Plaintiff thus has an interest in the property which is apparent at the time of suit, and as his father will not take any steps to protect the reversion, there is no good reason why plaintiff should not, under the general rule above cited, come forward to save the right for himself."

In No. 77 P. R. 1888 (2) the learned Judges (Tremlett, and Rattigan JJ.) held that remote reversioners were not bound by an assent given by the next reversioner to an adoption effected by a female in possession, and with reference to the assent so given they say:—"As it is, however, the plaintiffs claim, as being heirs of Sahib Singh" (the common ancestor) "and not through Mohan Singh, and therefore we do not see that they are on principle bound by his assent; indeed considering the limits which *Jat* custom often put on the power of a male proprietor to alienate at will, to hold that

(1) 84 P. R. 1898 F. B. (*Harvans Singh v. Harnam Singh*).

(2) 77 P. R. 1888 (*Lehna Singh v. Mussammatt Dharmo*).

“ the consent of the next reversioner necessarily bound those
 “ who came after him, when he himself had not succeeded
 “ would sometimes give greater effect to his assent than
 “ would have attached to his act had he been himself in
 “ possession and himself made the alienation in question.” To
 a similar effect are the rulings reported as No. 174 *P. R.*
 1888 ⁽¹⁾; 7 *P. R.* 1893 ⁽²⁾; 47 *P. R.* 1903 ⁽³⁾.

I have referred to these authorities because some stress
 was laid upon them in argument before us, but, as I have
 already remarked, I cannot agree that they are in any material
 point relevant to the question before us. They may be rele-
 vant when the court has to decide whether or not an aliena-
 tion which has been accepted, apparently *bonâ fide* by one or
 more heirs, is valid against remoter heirs. But they appear
 to me entirely irrelevant for the purpose of deciding whether
 the claim of the latter is, owing to the inaction of the next
 heirs to prefer their claims, barred under the law of limita-
 tion. I must, however, refer to the argument *ab inconvenienti*
 upon which the ruling of the Division Bench in No. 106 *P. R.*
 1906 ⁽⁴⁾ is mainly based. It is observed in the judgment that :
 “ the learned Divisional Judge held that because Mahtaba
 “ consented to Beli and Kaka retaining possession of the land,
 “ adverse possession did not begin to run in their favour until
 “ Mahtaba's death, a view in which we cannot concur, and which
 “ pushed to its logical conclusion, would practically make it
 “ impossible ever to obtain a title by adverse possession as re-
 “ gards agricultural land. It might be 1000 years before one
 “ of the collaterals refused his ‘ consent,’ and yet on this
 “ theory he would still have a right to sue within 12 years
 “ of the last consenting heir.”

With every respect, I confess I am not impressed with
 this argument. In the first place it is obvious that though
 the suit might not be barred by limitation, a reversioner, who
 sued for possession of land on the ground that an alienation was
 invalid, would stand little chance of success if it could be
 shown that a series of heirs prior to him in title, had actually
 accepted that alienation as binding upon them. In the next
 place, assuming that the plaintiff's claim appeared *prima facie*
 to be just and reasonable, would it not be in the highest degree
 unjust to hold that though he could not possibly under the

⁽¹⁾ 174 *P. R.* 1888 (*Ohuni Lal v. Nanda*).

⁽²⁾ 7 *P. R.* 1893 (*Gharib Khan v. Mirza Ali Bahadur Khan*).

⁽³⁾ 47 *P. R.* 1903 (*Thakar Singh v. Hira Singh*).

⁽⁴⁾ 106 *P. R.* 1906 (*Kaka v. Labh Chand*).

law have asserted his rights earlier, his claim was nevertheless barred by limitation because the next heir had for reasons of his own, abstained from claiming possession of the land? In the present case, the plaintiffs might, during the lifetimes of the widow and mother of Ranjha, have brought a suit for a declaratory decree; but it is problematical whether they would have succeeded in their suit, and even if they had, that decree would have been of no avail to them after the death of Badri, even if Badri had himself obtained such a decree prior to 1892, it would not have prevented defendants from setting up an adverse title to him after the mother's death. He, no doubt, could have made use of the decree in a suit for possession, but so long as he lived, plaintiffs had no legal right to sue for possession. The result would be that no matter what precautions they might have taken, plaintiffs' right to the estate would be barred by limitation if Badri lived for 12 years after the death of the last male owner's mother. It seems to me monstrous to hold that in these circumstances the plaintiffs are barred by the law of limitation, from preferring their present claim, and I am glad to find that the authority of the F. B. ruling in No. 18 P. R. 1895 (1) supports me in holding that this bar does not exist.

It is said that it will work great hardship on alienees, if they are to be rendered liable to a series of actions on the part of various reversioners. As I have said, I do not think that in practice this will be found to be the case. But apart from this, a person who takes ancestral land in the Punjab, whether by sale or gift, knows full well that he is taking property which may, and in all probability will, involve him in litigation of a peculiarly harassing nature. If, with his eyes open, he chooses to run the risk of such litigation, he has no one to blame but himself. At all events, the possible inconveniences to which he may be subjected are, in my opinion, of small moment compared with the grave injustice which would result from our holding that an heir to the property is, under the law of limitation, to be held debarred from preferring a claim thereto because that claim was not preferred at a time, when by the law it could not possibly be preferred, and when the only person who could prefer it was a 3rd party through whom the plaintiff does not derive his right to sue for possession. Unfortunately a man's collateral heirs in this Province are not invariably on the best of terms

(1) 18 P. R. 1895, F. B. (*Roda v. Harnam*).

either with him or *inter se*, and it is hardly too much to say that many of them would be only too delighted to prejudice their relatives by refusing to take action in cases such as the present. Moreover, it is at least anomalous to hold that to effect this object they would be unsuccessful if they actually alienated property, but would be entirely successful if they took no action whatever in protecting that property after it had been alienated by the holder for the time being.

If Badri, for example, had taken possession of the estate and had thereafter alienated it to the defendants, his action would have given plaintiffs' the right to contest his alienation within the periods prescribed by the Punjab Limitation (Ancestral Land Alienation) Act, 1900. But as he did not do so, and as he allowed defendants to hold adversely to him limitation must (according to appellant's argument) be taken to run against plaintiffs from 1892 and this too, though they could not until Badri's death sue for possession, nor in his lifetime for any declaratory decree.

While, therefore, fully appreciating the force of the arguments adduced in No. 106 P. R. 1906 (1) in support of the conclusions therein arrived at, I am, with every respect, unable to accept that decision as correct in law.

We were referred to certain authorities from other High Courts which deal with the question whether a more remote reversioner is under Hindu Law barred by a plea of adverse possession which would be effective against the next heir. These authorities are specified below (2-7). In my opinion, apart from the fact that there is a conflict of opinion upon the subject, they afford no guide to us in deciding a point which depends upon the principles recognized by the ordinary rules appertaining in agricultural communities in this Province.

The question referred to the Full Bench is one of great importance and I am fully aware that in replying to it in the affirmative, I am rendering it possible for an alienor's heirs to harass, almost *ad finitum*, a person to whom ancestral land has been alienated. But I must take the custom of this Province as I find it, and I do not feel justified in brushing aside the proposition of law, which was after due delibera-

(1) 106 P. R. 1906 (*Kaka v. Labh Chand*).

(2) *Bhugwant v. Sukhi* (1900) I. L. R. 22 All. 33 F. B.

(3) *Abinash Chandra v. Harinath* (1905) I. L. R. 32 Cal. 62.

(4) *Bahadur Singh v. Mohar Singh* (1902) I. L. R. 24 All. 94 P. C.

(5) *Amrita Lal v. Jatindra Nath* (1905) I. L. R. 32 Cal. 165.

(6) *Chiruvolu Punnamma v. Chiruvolu Perrazu* (1906) I. P. R. 29 Mad. 30 F. B.

(7) *Gokinda Pillai v. Thayammal*, (1904) 14 Mad L. J. 203.

tion enunciated by the Full Bench of this Court in No. 18 P. R. 1895 ⁽¹⁾. And if, as a result of this decision, persons who would be likely to take over ancestral estate are discouraged from doing so, I cannot think that any very great harm will be done. The recent policy of the legislature at all events tends towards the same direction, and this fact though it in nowise affects or has influenced the conclusions at which I have arrived, is not to be ignored in connection with the argument *ab inconvenienti* which has been addressed to us. But quite apart from this, I am strongly of opinion that from the point of view of equity, far greater injustice would be done if we held that a person was in a case such as the present, debarred from preferring his claims, than would be the case if we held (as I think upon principle we must hold) that the law of limitation does not stand in his way, but that his claim must nevertheless be considered in the light of the accepted fact that the alienation which he impugns has been recognized as valid by one or more of his predecessors in title.

For the reasons given I would reply to the question before us that plaintiff's suit is not barred by limitation.

SIR ARTHUR REID, C. J.—I concur in the reasons recorded by 30th Jany. 1911.
my brother Rattigan for answering the question referred in the affirmative. The authorities cited establish the rule that the right to sue was not derived by the plaintiffs from Badri and the result is that his inaction, or acquiescence did not affect their right of action which would certainly have accrued had he been the alienor. As pointed out by my brother Rattigan, the plaintiffs would not have improved their position by a declaratory suit, had Badri survived the declaratory decree for 12 years.

It is unnecessary to recapitulate the reasons recorded by my brother Rattigan for holding that the rule laid down in 106 P. R. 1906 ⁽²⁾ is incorrect, as I concur in those reasons, and have nothing to add to the judgment of my brother Rattigan. I concur in answering the question referred in the affirmative.

KENSINGTON, J.—I concur.

⁽¹⁾ 18 P. R. 1895 (*Roda v. Harnam*).

⁽²⁾ 106 P. R. 1906 (*Kaka v. Labh Chand*).

No 27.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Chevis.

BULAKI MAL—(PLAINTIFF)—APPELLANT,

Versus

Mr. C. J. Floyd—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 151 of 1909.

Indian Evidence Act, 1 of 1872, sections 92 and 94—Admissibility of evidence of conduct of parties subsequent to contract.—

Held, that although under Section 92 of the Evidence Act, no evidence of any oral agreement or statement can be admitted as between the parties to a contract in writing for the purpose of contradicting, varying, adding to or subtracting from its terms, evidence of the conduct of the parties subsequent to the execution of the document is admissible --

(1) As it may serve to show what the real meaning of the contract was, and

(2) as it may operate as an estoppel when it amounts to part performance of the contract.

Held also, (a) that on the evidence produced in this case the defendant had succeeded in showing that the real contract was different from that set out in the pro-note sued upon and was as alleged by defendant, and (b) that as the plaintiff had never set defendant right about the terms of the contract as understood by the defendant, the plaintiff was now estopped from setting up different terms.

Further appeal from the decree of Major A. A. Irvine, Divisional Judge, Lahore Division, dated the 10th November 1908.

Beechey for appellant.

Grey for respondent.

The judgment of the Court was delivered by :--

16th Dec. 1911.

JOHNSTONE, J.—Our brother Rattigan has set forth in his referring order of 3rd May 1909 the question on which he wishes the decision of a Division Bench to be taken and the events that have given rise to that question. Very briefly put, what has happened is that defendant-respondent, having executed a promissory note for Rs. 2,100 "with interest at the rate of two and a half per cent. per mensem", in favour of plaintiff, urged in the first Court and now urges that it was not intended that interest should be charged on the Rs. 2,100, but that the sum of Rs. 2,100 included advance interest and was all that had to be paid. No objection seems to have been made to his raising this contention, and he explained in detail how the sum of Rs. 2,100 was arrived at. Evidence was taken from him, and both

the Courts below and also our brother Rattigan have adopted the view that his version of the affair is the true one, and both those Courts passed decrees based on that version, the Lower Appellate Court merely allowing plaintiff more interest than the first Court was prepared to award.

Mr. Justice Rattigan, in addition to referring to this Bench the question whether defendant's evidence to prove what the contract really was is legally admissible, and the further question whether the above question can be raised in second appeal, ruled that if these questions are to be answered in the affirmative, defendant has proved that on 10th June 1906 he only received Rs. 1,200 and not Rs. 2,100 and that the appeal should be dismissed with costs. The question of instalments in the first Court's and Lower Appellate Court's decrees was not raised in appeal.

We have heard elaborate arguments from Mr. Beechey for plaintiff and Mr. Grey for defendant. The latter in his summing up stated that he supported the views of the Lower Courts in four ways :—

- (a) that plaintiff had been guilty of "fraud" and "misrepresentation," Proviso 1, Section 92, Indian Evidence Act ;
- (b) that this is a case of "want of consideration" Proviso 1 ;
- (c) that evidence of subsequent conduct is at least admissible, and it suffices to prove defendant's allegations ;
- (d) that evidence of extrinsic circumstances is admissible to show what meaning the parties attached to the promissory note.

In this argument he also suggested "mistake," and further hinted that Proviso 2 and Proviso 6 to Section 92, Indian Evidence Act applied and that there was no law to prevent the signatory of a pro-note from proving that full consideration did not pass. The pro-note having been proved or admitted, no evidence of any oral agreement or statement can be admitted, as between plaintiff and defendant, "for the purpose of contradicting, varying, adding to, or subtracting from its terms." The document contains a promise to pay on demand Rs. 2,100 with interest at $2\frac{1}{2}$ per cent. per mensem and defendant wishes to be allowed to prove that the oral agreement was that he was to pay off Rs. 1,200 principal and Rs. 900 interest

thereon in thirty monthly instalments of Rs. 70 each. This amounts to varying if not exactly to contradicting the terms of the pro-note.

We may say at once that Proviso 2 has, in our opinion, no bearing on the case before us, because the oral agreement alleged is certainly "inconsistent" with the terms of the pro-note. We also entirely agree with our brother Rattigan in regard to (b) "Want of consideration" and "mistake." Neither of these points can be successfully taken here.

Proviso 6 is not easy to apply in a case like this. Even if only Rs. 1,200 was owed, Rs. 2,100 may have been promised as principal. Thus there is no necessary precise correspondence between what was owed and what was promised, and so the only vital existing fact is what defendant intended to promise to pay. This Proviso therefore cannot be invoked by defendant, and this same argument disposes of the suggestion that the evidence under consideration is admissible because the executant of a pro-note can always attempt to prove non-receipt of consideration. He can attempt to prove that; but there is no necessary connection between consideration and promise, and, as our brother Rattigan has pointed out, no want of consideration in the proper sense of the phrase is pleaded.

Turning to (a) above we have some difficulty in agreeing with Mr. Grey. It is a well known maxim that if a plea of fraud is to be relied on, it must have been specifically pleaded. In his pleas paragraph 6, defendant stated "plaintiff has "overreached defendant and has taken advantage of his ignorance of law and need." This read with the previous pleas seems to us to amount to a complaint of the exercise of undue influence rather than of fraud; and at all events the precise fraud has not been specified. In the course of the case it came out that defendant complained that he had been overreached, inasmuch as the monthly interest was to be kept the same regardless of progressive diminution of principal debt, but there is no allegation that plaintiff deceived defendant and made him think he was promising Rs. 2,100 in all when he was writing words (the promissory note is in defendant's own hand) embodying a promise to pay Rs. 2,100 and interest. Similarly, we doubt whether the plea of "misrepresentation" can help defendant.

Mr. Grey's contentions (c) and (d) may be considered together. Extrinsic circumstances may be previous statements

or acts of the parties or statements or acts subsequent to execution of document. Of all these in our opinion under our law of evidence defendant can certainly be allowed to prove conduct subsequent to execution of document. A few words will explain our meaning. Subsequent conduct of parties (i) may serve to show what the real meaning of the contract was, or (ii) may operate as an estoppel when it amounts to part performance of the contract; see *Baksu Lakshman v. Govinda Kanji* (1) for this differentiation. A Division Bench of this Court has in 72 P. R. 1901 (2) explained the net result of the numerous previous rulings regarding section 92 of the Indian Evidence Act, and has held that while the doctrine laid down in *Baksu Lakshman v. Govinda Kanji* (1) and in rulings based on that case has been swept away by the Privy Council decision in *Balkishen Das v. W. F. Legge* (3) the rule enunciated in *Kanshi Nath Chatterji's* case by Sir Barnes Peacock (*Kanshi Nath Chatterji v. Chundy Churn Banerji*) (4) had not been touched, under which evidence of "acts and conduct of the parties subsequent to the deed" is admissible to show that something different from the "written contract was intended by them." We propose to accept this *dictum*, though there is something to be said for the idea that evidence of subsequent conduct should not in view of section 94, which was not considered in 72 P. R. 1901 (2) be admitted to show directly what the real meaning of the contract was, where its wording is plain and unambiguous but only to establish an estoppel.

Looking at the matter in this way, the only evidence we can consider is defendant's payments to plaintiff after the execution of the document and the letter defendant sent to plaintiffs showing the account to date drawn upon defendant's theory of his real liability which letter was not protested against in reply but was simply acknowledged. Our brother Ratnagan has clearly taken much more evidence than this into account, in forming his opinion that defendant's version of the affair is the true one. Further he finds that on 10th June 1906 defendant only received Rs. 1,200 and not Rs. 2,100 and therefore the appeal should be dismissed with costs if all that evidence is admitted. This as we have shown, seems to us hardly to follow as a necessary consequence, for a man may receive Rs. 1,200 only and yet intentionally promise to pay Rs. 2,100. The question

(1) (1881) I. L. R. 4 Bom. 594.

(2) 72 P. R. 1901 (*Abdul Ghafur v. Abdul Kadir*).

(3) (1900) I. L. R. 22 All. 149 P. C.

(4) (1866) 5 W. R. 68.

to be decided is whether the evidence, which we say above is all we can consider, is sufficient to show that the real meaning of the contract was as stated by defendant, and that plaintiff should not be permitted to urge the contrary.

That evidence is partly oral, *i. e.*, defendant's own assertions on oath, and partly documentary. Defendant has asserted, and this is not denied, that he paid Rs. 70 on the day of the execution of the promissory-note. He has also stated—see his deposition and the statement of account, exhibit D II, he has put in—that he has paid off Rs. 1,060 since he executed the note; and we do not understand that plaintiff denies this. Plaintiff does not deny this total, and as regards the details of it he shows no alternative statement, indeed, he says he keeps no accounts; and in these circumstances I think we can take it as proved that the items in exhibit D II were paid off as stated in that document, especially as a great many of them are actually proved by acknowledgments of plaintiff's and by money order receipts.

Next in that document an entry of July 1907 shows a payment of Rs. 260. In connection with this exhibits D XIII and D XIV are important. In making that payment it is clear that defendants wrote to plaintiff stating that he had paid interest up to end of July 1907 and that the balance due was Rs. 1,000, as in exhibit D II. Plaintiff merely acknowledged receipt and he has not produced defendant's registered letter containing the remittance of Rs. 260. Defendant thereupon wrote the letter of which D XIV is his office copy and of which plaintiff has not ventured to produce the original. In it defendant, who had apparently up to that time gone on paying sums of money from time to time on the supposition that his theory of the meaning of the contract was the correct one, again states that Rs. 1,000 only remains due and asks plaintiff to allow him to substitute for the "exaggerated (?) and incorrect document" he was holding a "proper document." To this, it seems, there was no reply; and till April 1908 inclusive defendant went on paying monthly sums of Rs. 30—the interest on Rs. 1,200—with two additional payments of Rs. 120 in October 1907 and Rs. 80 in November 1907, plaintiff making no objection and making no attempt to combat defendant's presentation of the case.

In these circumstances, we are of opinion, that defendant has made out a strong case for his allegation that the real contract was as he has stated it. He has also made out a clear estoppel against plaintiff. When defendant paid Rs. 70 upon

execution of the promissory note and plaintiff accepted the payment; it is certain that defendant thought he was paying Rs. 30 interest and Rs. 40 against principal: otherwise, there is no sense in the payment which does not represent a month's interest on Rs. 2,100. The certainty is heightened when we find defendant paying Rs. 30 instalment from time to time, and finally in July 1907 paying 260, expressly stating it to be 85 principal and 180 interest to date, for six months' arrears. Finally the matter is put beyond all doubt by exhibits D XIII and XIV aforesaid. Plaintiff should have put defendant right, if he was wrong, at the earliest possible opportunity, for then defendant might have either sued for a declaration regarding the meaning of the promissory note or might if he succumbed to plaintiff's views, have arranged to pay more and so prevent accumulation of interest. Plaintiff, in short, by his acts and omissions induced defendant so to act as to injure his position; and thus estoppel is completely established.

In these circumstances we hold that the decree appealed against is correct and we dismiss the appeal with costs.

Appeal Rejected.

No. 28.

Before Hon. Mr. Justice Shah Din.

GANGU AND TEJU—(PLAINTIFFS)—APPELLANTS,

Versus

KANSHI RAM AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 548 of 1910.

Custom (Alienation)—Alienation by father—suit to contest alienation by sons—Sodhi Khatries of mauza Thathi Khara, tahsil Tarn Taran, district Amritsar—onus probandi—Hindu Law.

Held, that the plaintiff, on whom the *onus* lay, had failed to prove, that Sodhi Khatries of mauza Thathi Khara, Tarn Taran tahsil of the Amritsar district in matters of alienation were governed by agricultural custom and not by Hindu law.—

79 P. R. 1909 (*Sardar Singh v. Maharaj Das*) followed.

Further appeal from the decree of M. L. Waring, Esquire, Additional Divisional Judge, Amritsar Division, dated the 2nd February 1910.

Rambhaj datta, for appellants,

Sheo Narain, for respondents.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—After hearing arguments on both sides, I 8th March 1911. think that the view taken by the learned Divisional Judge is

right and that this appeal must fail. The sole question for decision is as to whether the plaintiffs who are Sodhi Khatri of the village of Thatbi Khara in Tarn Taran tahsil, are governed in matters of alienation by Hindu law or by custom. Both the Courts below have decided that it is not proved that custom governs the plaintiffs, and they have therefore concurred in dismissing the plaintiffs' suit for possession of the land in dispute, brought by them on the ground that the sale of it made by their father in 1883 was made without consideration and legal necessity and was therefore invalid. It is not denied that the plaintiffs' family owns only 152 *kanals* out of the total village area, 4,158 *kanals*; that they are entered in the settlement record as *malikan-i-maqbuzi* having no share in the *shamilat* and that they are not entirely dependent upon agriculture but that they derive part of their income from the offerings made at a *gurdwara* in the village, which is in charge of the plaintiffs' family. It is also proved that a *jagir* worth Rs. 168 was given by the Sikh Government to the plaintiffs' grandfather, Jamiat Singh, and that this *jagir* was continued to him by the British Government in 1865. Jagat Singh, father of the plaintiffs, was admittedly a deed writer and did not cultivate land with his own hands. All these facts raise a strong presumption that these Sodhi Khatri do not follow agricultural custom. It is urged by the appellants' pleader that the lands belonging to the Sodhi Khatri in this village are constituted into a separate *patti* known as Patti Sodhi, and that this shows that they form a compact community of their own and must be presumed to have adopted the customs of the Sikh Jats, among whom they have settled. The so called Patti Sodhi consists, however, of the small area of 152 *kanals* above referred to, which was acquired by a decree by the plaintiffs' grandfather in 1852, and the mere fact of this *patti* being recorded separately in the settlement papers of 1865, is insufficient to prove that these Sodhi Khatri had adopted agricultural custom with all its incidents to the exclusion of Hindu law. The facts of this case are very similar to those of the case reported as No. 79 P. R. 1909 (1) and I agree with the Courts below in holding that the plaintiffs, on whom the *onus* was rightly laid, have failed to shew that in matters of alienation they are governed by custom and not by Hindu law.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 29.

*Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice
Shah Din.*

MUSSAMMAT ISHAR KOUR—(PLAINTIFF)--APPELLANT,

Versus

RAJA SINGH AND OTHERS—(DEFENDANTS)--RESPONDENTS

Civil Appeal No. 1050 of 1908.

*Custom (Alienation)—Succession—Nature of immovable property acquired
out of savings from income of "ancestral" property.*

*Held, that a mortgage of land acquired by a female, subject to Punjab
custom, is not "ancestral" property because the mortgage money was
paid by her out of savings from her income derived from "ancestral"
property,*

*First appeal from the decree of Lal Ram Nath, District Judge,
Ludhiana, dated the 26th May 1908.*

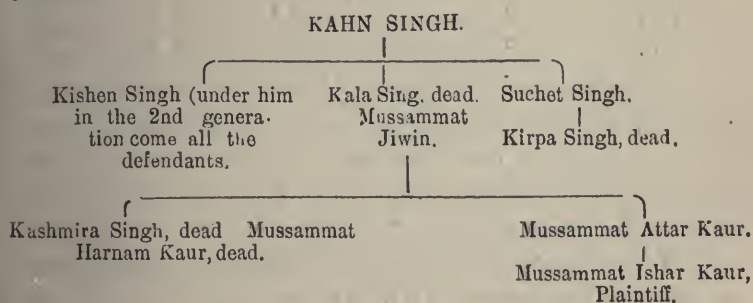
Muhammad Shafi, for appellant.

Lajpat Rai, for respondents.

The judgment of the Court was delivered by:—

13th Feb. 1911.

JOHNSTONE J.—For the purposes of this case the following
pedigree table will suffice to show the relationship of the
parties—



Plaintiff sues defendants for possession "by inheritance" of 839 bighas, 12 biswas khaṇ, made up thus.

(a) * * * * *

(b) * * * * *

(c) 41 bighas, 10 biswas, held in mortgage, in Mauza
Chakohi.

(d) * * * * *

(e) * * * * *

The land (c), it is asserted by plaintiff, was acquired by Mussammat Attar Kaur herself, having been taken in mortgage by her for Rs. 400 on 12th September 1903.

On these facts plaintiff (see paragraph 4 of plaint) claims the whole property, which has been taken possession of by defendants because being daughter of Mussammat Attar Kaur, and daughter's daughter of Mussammat Jiwin, she is "by law and custom under all circumstances entitled and "heir to the property in dispute left by the deceased "women." She asserts also that certain property in Patiala State has been given to her, the authorities there recognising her title.

Defendants denied the gift of (a) and (b), and Mussammat Jiwin's power to make such a gift, denied possession of doree under the gift, asserted that the whole of the land in suit was "ancestral", and added that Mussammat Jiwin had no power to transfer any of the land, whether it was ancestral or not, which came to her from her husband, denied the acquisition of (c) by Mussammat Attar Kaur; and asserted their superior right of inheritance as compared with plaintiff.

Plaintiff having replied, the following issues were drawn up:—

- | | | | | | |
|------|---|---|---|---|---|
| (1) | * | * | * | * | * |
| (2). | * | * | * | * | * |
| (3). | * | * | * | * | * |
| (4). | Whether Mossammat Attar Kaur acquired (e). | | | | |
| (5). | Whether the land in dispute is the ancestral property of the defendants? What is the effect of this fact upon the present case? | | | | |

* * * *

The Court also held that though Mussammat Attar Kaur did take up the mortgage (c), yet, inasmuch as she must have paid for it out of the profits of "ancestral" property, it must be treated as "ancestral." It therefore dismissed plaintiff's suit with costs.

Plaintiff has appealed and we have heard very lengthy arguments and have carefully examined the whole record. In the memorandum of appeal we are asked to hold that the property in suit is not ancestral *qua* defendants; that the *onus* to prove superior right lay on defendants, who have not discharged it; that the aforesaid gift is valid, that plaintiff is at least entitled to the land (c).

We may clear the ground by at once agreeing with the appellants as to the land (c).

This is hardly contested by Mr. Lajpat Rai, and we need not do more than refer to the deed of mortgage (p. 5, Part A paper book, and especially p. 8, the endorsement of the Sub-Registrar), and to the deposition of the mortgagor Maghi (p. 38, Part A). A perusal of these leaves no doubt in our minds that in the eye of the law Mussammat Attar Kaur herself acquired this mortgage, and the Lower Court's view that because the money came to her as profits of "ancestral" land the mortgage must be taken to be "ancestral" property, is doubly wrong, for (1) none of the property in suit is "ancestral" *qua* defendants. *Cf.* 76 P. R. 1898 (1), and C. A. 631 of 1901, and (ii) the dictum that immovable property bought from the profits of ancestral immovable property is itself ancestral is clearly unsound and has been frequently held to be so.

[The remainder of the Judgment is not required for the purpose of this report. Ed.]

No. 30.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Chevis.

KARAM ALI—(PLAINTIFF)—APPELLANT,

Versus

SULTAN AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 899 of 1909.

Lis pendens—pre-emption—exchange of land during pendency of suit to a pre-emptor having superior rights, after expiry of period of limitation—

Held, that the doctrine of *lis pendens* applies to an exchange of land, made during the pendency of a suit for pre-emption, in favour of a person who had a superior right to pre-empt but who had not enforced that right and whose right to sue had become barred by lapse of time before the land was exchanged.

26 P. R. 1908 (*Mahmud Khan v. Khuda Bakhsh*) distinguished.

Further appeal from the decree of Major B. O. Roe, Divisional Judge, Multan Division, dated the 5th May 1909.

Jalal Din, for appellant.

Vishnu Singh, for respondents.

The judgment of the Court was delivered by :—

CHEVIS J.—By deed executed on 29th January 1907 and 22nd Dec. 1910. registered on 30th January 1907, defendants 5 and 6 sold the land in dispute to defendants 1-4. On 20th January 1908 plaintiff sued to pre-empt. On 1st February 1908 Chuhar

(1) 76 P. R. 1898 (*Jowahir Singh v. Dial Singh*),

reported to the *patwari* that he had taken the land in dispute in exchange for other land. Chuhar, who has been impleaded as defendant No. 7 has a right of pre-emption superior to plaintiff, and the learned Divisional Judge, holding that Chuhar took the land in exchange within the period of one year from date of sale, has reversed the decree of the first Court and dismissed the suit. There is, as is admitted by Chuhar's counsel, no proof of the date of the exchange, but he urges that the fact that Chuhar, on 1st February 1908, when reporting the exchange to the *patwari*, mentioned that it had taken place four months previously, is good ground for holding that the exchange took place within a year from the date of sale. But had the exchange taken place four months prior to this report we should have expected to find the fact noted in the *girdawari* papers of the *kharif* of 1907. And the mere statement of Chuhar as to the date of the exchange is no proof; if he knew of the institution of plaintiff's suit (and it is not at all improbable that he did know of it) he would be very likely to antedate the exchange so as to make it appear to be an exchange prior to the institution. We can find no proof that the exchange was really effected on any date prior to 1st February 1908, and we must take that to be the date of the exchange.

Now the subject of the sale did not admit of physical possession at the time of sale, as it was in mortgage and part of the sale money was left with the vendees to redeem the land. So limitation for a pre-emption suit expired on 30th January 1908. (See article 10 of 2nd schedule of Limitation Act, 1877). So on the date of the exchange Chuhar's right to pre-empt had become time-barred. Had he then sued to pre-empt, his suit would have been dismissed as time-barred. We must therefore regard the exchange as a voluntary one, and not as a transaction in which Chuhar was enforcing his right of pre-emption. This distinguishes the case from 26 P. R. 1908 (1), which has been relied on by the learned Divisional Judge; in 26 P. R. 1908 (2), the land was sold to a pre-emptor with superior rights within the period of limitation, and the doctrine of *lis pendens* was held to be inapplicable. Here, however, Chuhar's pre-emptory rights had become extinguished by lapse of time.

We accept the appeal and reversing the decision of the learned Divisional Judge, we remand the case under order 41, rule 23. Stamp on appeal in this Court to be refunded, other costs of this appeal to be costs in the cause.

Appeal accepted—Case remanded.

(1) 26 P. R. 1908 (*Mahmud v. Khuda Baksh*),

No. 31.

Before Hon. Mr. Justice Kensington and Hon. Mr. Justice Rattigan.

KARM CHAND—(PLAINTIFF)—APPELLANT,

Versus

MUSSAMMAT BASANT KAUR AND OTHERS—(DEFENDANTS)
—RESPONDENTS.

Civil Appeal No 897 of 1907.

Minor—Mortgage by—after attaining majority, for consideration received during minority—Validity of—Indian Contract Act, IX of 1872, section 25 (2)—Rule laid down in 59 P. R. 1907 F. B. (1), as to necessity of full consideration for a mortgage, explained.

Held, that it is not open to a mortgagor who had to his own knowledge received the whole of the money which is the actual consideration for the contract and had to receive nothing more, to plead subsequently that the mortgage was incomplete and void simply because the deed of mortgage recited more consideration than was actually paid. The rule laid down in No. 59 P. R. 1907 F. B. (1) is not applicable to such a case, the consideration for the mortgage relating not to a future payment but to an alleged payment in the past.

Held also, that although it was now settled law that a promise by an infant is a mere nullity and void, yet an agreement made by a person of full age to compensate wholly or in part a promisee who had already voluntarily done something for the promisor even at a time when the promisor was a minor, did fall within the terms of section 25, clause (2) of the Indian Contract Act, 1872, and consequently a mortgage made for this purpose was binding on the representatives in interest of the mortgagor, but merely to the extent of compensating the mortgagee for monies and articles actually supplied to the mortgagor during his minority as well as after he came of age.

Indram Rama Swami v. Authappa (2) differed from.

First appeal from the decree of F. B. R. Spencer, Esquire, District Judge, Amritsar, dated the 22nd April 1907.

Shadi Lal and Tirath Ram, for appellant,

Muhammad Staff and Duni Chand, for respondents.

The judgment of the Court was delivered by :—

RATTIGAN, J.—The plaintiff in this case is one Karm Chand of Lahore and his claim is for the recovery of Rs. 7,925, of which sum Rs. 5,000 represents the principal amount due to him and Rs. 2,925 the interest thereon. 6th Dec. 1910.

(1) 59 P. R. 1901 F. B. (Gokal Chand v. Rahman.)

(2) (1906) 16 Mad. L. J. 422.

The amended plaint runs as follows .—

“(1) On the 5th September 1899 defendant No. 1 (Sardar “Kalwant Singh son of Sardar Ajit Singh of Atari) having “mortgaged with possession his immovable property, detailed “in paragraph 2 of the plaint, to the plaintiff for Rs. 5,000 “under a mortgage deed, agreed to pay interest at the rate “of Rs. 1 *per cent per mensem*. On the same date the said de- “fendant also executed a deed of rent in favour of the plaintiff “whereby he agreed to pay Rs. 50 a month.

(2) (This paragraph details the property above referred to).

(3) According to the terms of the mortgage-deed defendant No. 1 agreed that Rs. 50 *per month* would be paid on account of interest, that the unpaid amount of interest (if any) would be considered as principal which would be recoverable from the said mortgaged property, and that the principal money would be paid to the plaintiff on demand.

(4) From the date of the execution of the mortgage-deed up till now defendant No. 1 has not paid any amount towards interest, nor has he paid the mortgage-money, though repeated demands for interest were made from him at Atari.

(5) About one month ago, the plaintiff, who is a resident of Lahore, came to know that defendant No. 1, mortgagor, absolutely alienated the entire immovable property mortgaged with possession to the plaintiff; shown in clause No. 2 of this plaint along with his other property with the exception of the immovable property (mentioned in paragraph No. 2 (e) of this plaint and shown in plan No. 3 attached hereto), to Ram Rakha Mal, Uttam Singh and Tilok Chand, defendants Nos. 23, 24 and 25. He (defendant No. 1) along with his other brothers also alienated his one-fifth share shown in plan in No. 3 (showing present aspects) to Madho Ram and Billa Singh, defendants Nos. 2 and 3. Getting knowledge of this the plaintiff sent a notice by post to both the said persons on the 31st December 1903, and informed them that the share in question had been mortgaged to him (the plaintiff).

(6) Subsequently it came to be known that defendants Nos. 2 and 3, keeping a part of the property shown in plan No. 3 in their possession, alienated the rest of the property to different persons, *viz*, to defendants Nos. 4 to 19, who respectively took possession of the mortgaged property by altering its form.

(7) According to law the plaintiff's mortgage lien in respect of the mortgaged property is preferential as against all the rights which were subsequently acquired by different persons. Although defendant No. 1 and the other defendants were repeatedly asked to pay the plaintiff's mortgage money and interest, yet they continued giving evasive answers and eventually made a refusal at Amritsar two weeks ago.

(8) The plaintiff's prayer is as follows :—

A decree for Rs. 5,000 principal and Rs. 2,925 interest, due from the 5th September 1899 to the 19th July 1904, *viz*, Rs. 7,925 in all, *recoverable from the mortgaged property mentioned in paragraph No. 2 of this plaint may be passed* with costs of the suit in favour of the plaintiff against the defendant, and the amount of the decree may be ordered to be recovered by auction sale of the mortgaged property. If the value of the mortgaged property be not sufficient to cover the mortgage-money and interest then *the deficiency may be ordered to be recovered from the person and other movable and immovable property of defendant No. 1*, and interest at the rate of Rs. 1 per cent per month up to the time of the payment of the mortgage-money may also be allowed. If in the course of enquiry the plaintiff is found entitled to any other relief, a decree may be passed for that relief also.

The mortgage-deed upon which the claim is based was executed on the 5th September 1899 and was duly registered the same day at Lahore, the Sub-Registrar's endorsement being to the effect that the document was presented for registration by Sardar Kalwant Singh (who was identified by two residents of Lahore) and that the latter admitted the execution and completion of the document and receipt of the consideration money as therein detailed.

The pleas of defendant No. 1 were as follows :—

"When I was a minor under the Court of Wards at the 'Chiefs' College, plaintiff used to supply me with cloth and 'charge me double for it in his books, and he used also to 'get *hundis* written carrying interest with reference to the 'same debts. I never received any money consideration for 'the mortgage. After discharge from the Court of Wards, 'plaintiff brought a case against me in the Lahore District 'and intimidated me into executing the mortgage-deed. The 'mortgage-deed was fictitious and without consideration. Plaintiff had orally promised that he would press for payment

"of merely the real price of the cloth. If the plaintiff's books are examined, the whole transaction will be made clear. Plaintiff used to get defendant to do what he wanted, threatening to complain against him to higher authorities. (Deputy Commissioner, Chief's College, etc.)".

Defendants 2, 3, 7, 17, 18, 20, 23, 24, and 25, put in no appearance and proceedings against them were *ex parte*.

The other defendants are persons to whom the properties specified in the mortgage-deed have been alienated from time to time and their pleas were to the effect that they were unaware of the mortgage in favour of plaintiff and were not bound by it; that they were *bona fide* purchasers for value, and that in any event, the plaintiff could not obtain possession of the properties in their hands without compensating them for the improvements which they had effected.

The pleadings were taken by Lala Kesho Das, and on his transfer, his successor, Mr. Bird, framed the following issues (on the 9th May 1906), viz. :—(1) Was the mortgage-deed executed under undue influence? (*Onus probandi* on defendant No. 1).

(2) Was it executed without consideration? (*Onus probandi* on defendant No. 1).

(3) Has defendant No. 26 effected any improvements in the property and will this affect the plaintiff's rights? (*Onus probandi* on defendant No. 26).

On the 29th May 1906 certain defendants objected to the frame of the *third* issue and by agreement of the parties this issue was amended as follows :—

(3) Have defendants effected any improvements in the property?

The District Judge (Mr. Bird) thereafter proceeded to record the evidence, and on the 2nd August 1906 one witness, Ram Labhaya (defendant witness 1), was examined and cross-examined. The case was adjourned to the 23rd August, on which date the plaintiff, Karm Chand, and the three other witnesses (Atar Singh, Vir Bhan and Sardar Balwant Singh) were examined on behalf of defendant No. 1. This concluded the evidence which that defendant desired to adduce and his case was closed on that date. The District Judge directed that "plaintiff's evidence and the evidence of any of the other defendants who may wish to produce evidence." Should

be taken on the 24th October, and the case was adjourned to that date. On the 24th October it was reported that defendant No. 1 (Sardar Kalwant Singh) had died, and by subsequent orders the two widows of the deceased (Sardarnis Basant Kaur and Datar Kaur) were brought on the record as his representatives. Apparently only Sardarni Datar Kaur decided to take an active part in the litigation. She, however, put in a written statement, the effect of which is summarised by the District Judge as amounting to a plea that her answers to the claim were the same as those put forward by her deceased husband, with the addition that as plaintiff had not given full consideration for the mortgage-deed that deed could not be enforced, (see the District Judge's order dated 3rd January 1907).

The District Judge thereupon added the following 4th issue:—

“ If the full consideration for the mortgage-deed has not been paid, can the suit succeed ? ”

The hearing was adjourned to the 6th February 1907, and on that date three witnesses were examined on behalf of plaintiff and two on behalf of the other defendants. The case for all parties then closed and the District Judge fixed the 20th February for arguments. Owing, however, to various causes arguments could not be heard until the 15th April 1907, by which date Mr. Bird, who had presided over the Court during the whole period when the witnesses were being examined, had left the Court and his place had been taken by Mr. Spencer. The latter officer heard the arguments, and on the 22nd April delivered judgment, dismissing plaintiff's suit *in toto*. The learned Judge held (1) upon the *first issue*, that the mortgage-deed sued upon was “ the direct result ” of the criminal proceedings referred to in the written statement of defendant No. 1 (Sardar Kalwant Singh) and “ was unquestionably due to the exercise of undue “ influence.”

(2) Upon the *second issue*, that proof of consideration was practically *nil*; that “ defendant No. 1 was a minor and under “ the Court of Wards and was being supplied with all necessities by the Collector of Amritsar ” and that “ if anything “ was given, then such articles of clothing were quite unsuitable “ and unnecessary for a young man like defendant No. 1 ; ” (3) upon the *third issue*, that defendants had not shown that any improvements in the property had been effected and that defendants had in fact made no effort to prove any such improvements ; and (4) upon the *fourth issue*, that as plaintiff had

not proved that consideration passed in full, he must fail, especially as the mortgage-deed was the direct result of undue influence.

Plaintiff's suit was accordingly dismissed with costs, and he has preferred an appeal to this Court from the decree passed against him. The alienee-defendants have not preferred any cross-objections with regard to the District Judge's finding on the *third issue*, nor has any one addressed us on their behalf with regard to that finding. We may take it, therefore, that they have accepted that finding.

We have heard lengthy arguments by Mr. Shadi Lal, on behalf of the plaintiff-appellant, and by Mr. Muhammad Shafi on behalf of the representatives of Sardar Kalwant Singh, and we hope, in the course of this judgment, to deal with all the points urged before us. But before proceeding to give our decision upon these points we may observe that it was singularly unfortunate that in a case of this kind the learned District Judge, who had presided over the Court during the time when the issues were fixed and the witnesses were being examined, should have left the Court before the case actually concluded, and that the decision of the suit should have fallen to the lot of an officer who obviously knew nothing about it until he heard the arguments of the pleaders at the conclusion of the proceedings. Mr. Shadi Lal has complained, and not unnaturally, that the finding of the District Judge on the second issue (namely, whether consideration passed) has been given against the plaintiff, despite the fact that the burden of proof was laid by Mr. Bird upon the defendant No. 1. There is force in his objection, for Mr. Spencer, in that part of his judgment which deals with this issue, clearly assumes that *plaintiff* has failed to prove that full consideration passed and has taken it for granted that the burden of proving that such consideration passed rested upon plaintiff. Moreover, the learned District Judge has stated in his judgment that at the time when the articles were being supplied to defendant No. 1 the latter was a minor. Defendant No. 1 in his written statement did, no doubt, make the allegation, but there is on the record as it stands before us, nothing in the nature of evidence to support it, and there was no issue (as there should have been) upon the point. In this connection we think it only right to say that this case has been conducted in the Court below on both sides in a most careless and slipshod fashion. Obviously, it was a matter of moment for defendant No. 1 to prove that he was under the age of 21 when the plaintiff's

dealings with him commenced, and yet no attempt was made to substantiate his plea to that effect. On the other hand, plaintiff's advisers, for reasons best known to themselves, appear to have deliberately refrained from producing in Court, and proving, certain documents which must necessarily have greatly strengthened their client's case. Mr. Shadi Lal was most anxious that we should accept these documents, now produced before us, as evidence in the case, but, as he had himself to admit, they are unproved, and could not, therefore, be received by us in evidence, if we are to adhere to the provisions of the law. Furthermore, plaintiff's advisers instead of calling Mr. Herbert, a well known and highly respected pleader of this Court, to give evidence in their client's behalf as to what transpired on the 5th September 1899, when the mortgage-deed was executed, contented themselves with calling Mr. Herbert's clerk, whose evidence was more or less second-hand and who (we say it without any disparagement to the witness) could hardly be regarded as a witness of the same weight as his employer.

Having made these remarks by way of preface, we proceed to deal with the appeal now before us.

In support of the appeal Mr. Shadi Lal argued (1) that there was no proof on the record that defendant No. 1, Kalwant Singh, was a minor at the time when plaintiff first began to deal with him, *i. e.* on the 30th March 1898; (2) that defendant No. 1 from time to time signed balances struck in plaintiff's books, and eventually, on the 2nd March 1899, not only in his own handwriting admitted the correctness of the balance struck on that date in plaintiff's books, but, also wrote a letter (exhibit P. 4) to the same effect on the same day; (3) that on the 5th September 1899, defendant No. 1 executed a deed of mortgage (exhibit P. 1) for the sum of Rs. 5,000 and also a bond for a sum of Rs. 956-13-6, in favour of plaintiff, and that the said deed was on that date presented for registration by defendant No. 1, who admitted receipt of full consideration before the Registrar; (4) that even if the mortgagor was a minor at the time when the transactions began, the mortgage of the 5th September 1899 was admittedly made after the mortgagor had attained majority, and that this transaction amounted to a new contract, the validity of which could not be affected by the fact that part of the consideration related to transactions entered into by him during his minority, No. 86 P. R. 1888 (1); Cunningham and Shepherd's Indian

(1) 86 P. R. 1888 (*Budha Mal v. Boria Missar*).

Contract Act (8th edition p. 106 referring to *Sindha Shri v. Abraham* ⁽¹⁾); (5) that there was no evidence to support the finding of the District Judge that the mortgage was executed under undue influence, but that on the contrary, the plaintiff's evidence proved that the mortgagor had for some days prior to the execution of the deed, had the benefit of legal advice with regard to the draft deed which had been submitted to him for consideration and that he executed that and voluntarily and after full deliberation; (6) that even if the mortgage was voidable at the instance of the mortgagor on the ground that it had been executed by him while a victim to undue influence, the mortgagor had subsequently rectified the bargain by writing an acknowledgment to that effect on the 1st December 1902, (*vide* a document marked "exhibit P. 3"); and (7) that in any event, the mortgagor had undoubtedly received goods and monies from the plaintiff and that in consequence the Court should, in equity, grant compensation to the plaintiff as contemplated by the provisions of section 19 A. (2) of the Indian Contract Act.

In reply Mr. Muhammad Shafi traversed all Mr. Shadi Lal's arguments and contended that plaintiff's suit was rightly dismissed *in toto* inasmuch as (1) plaintiff had taken advantage of defendant No. 1's minority and inexperience to supply him at exorbitant rates with wholly unnecessary articles assuming, that is to say, that such articles were actually supplied, which the learned counsel did not admit; (2) the mortgage-deed of the 5th September 1899 was in law invalid against defendant No. 1, as the greater part of the consideration related to transactions that took place while the mortgagor was a minor, (*Indram Rama Swami v. Authappa* ⁽²⁾); (3) the terms of the mortgage-deed and the circumstances attending its execution established defendant's plea that there had been undue influence exercised by the plaintiff over defendant No. 1; (4) the so called "exhibit P. 3", dated 1st December 1902, had not been proved, or even brought on the present record, and there was, therefore, no proof of any subsequent confirmation of the original contract, and no plea to this effect had been so much as hinted at in the Court below or even in the grounds of appeal in this Court; (5) there was no trustworthy evidence to show that the consideration for the mortgage had passed either in whole or in part, (6) the mortgage was effected with the object of "stifling a prosecution" and of compounding

(1) (1898) *I. L. R.* 20 *Bom.* 755.

(2) (1906) 16 *Mad. L. J.* 422.

an offence which was not compoundable, and was therefore a contract opposed to law and as such illegal; (7) as part at all events of the consideration had not been proved to have passed, the mortgage must be regarded as incomplete, and, upon the authority of certain rulings of this Court (Nos. 100 *P. R.* 1889⁽¹⁾; 103 *P. R.* 1906⁽²⁾ and 59 *P. R.* 1907, *F. B.* ⁽³⁾), the contract must fail as a whole, and as the plaintiff in his plaint claimed merely by virtue of his rights under the mortgage-deed and as a mortgagee, his suit must necessarily be dismissed in its entirety.

With this last argument we may at once deal. Assuming, for the present purposes, that the mortgagor at the time when he executed the deed had not actually received the full sum of Rs. 5,000 which according to the terms of the deed and his admission before the Registrar he had received, we cannot agree that solely on that account, the mortgage must be held to be voidable at his option. The cases relied upon by Mr. Shafi relate to an entirely different state of things. If a mortgagee undertakes to pay the mortgagor himself or the creditors of the mortgagor a certain sum of money and thereafter fails to carry out his promise in its entirety, the rulings cited would appear to support the contention that, no matter how insignificant the amount which the mortgagee had failed to pay, the mortgage would be inoperative against the mortgagor. But this rule cannot possibly apply to a case of the kind now before us, where the consideration relates not to a future payment but to a payment in the past. In the former case, "the mortgagor may well say, the mortgagee induced me to contract by promising to pay a certain sum of money and as he has failed to pay that sum, I, on my part, was no longer bound by my agreement." But in the latter case, the mortgagor at the time when he contracts has presumably received, and knows that he has received, the whole of the money which is the consideration for his contract, and he knows that he is to receive nothing more. In these circumstances if, for reasons of his own, he chooses to admit that he has received Rs. 5,000 when, in point of fact, he has received only Rs. 4,000, we do not think that it is open to him to plead thereafter that the contract is incomplete because at the time he had not received the full amount which he admitted to have at that time already received. Of course, even in the latter case, it would still be

(¹) 100 *P. R.* 1889 (*Gopal Sahi v. Mussammat Hussain Bibi*).

(²) 103 *P. R.* 1906 (*Saudagar Singh v. Sant Ram*.)

(³) 59 *P. R.* 1907 *F. B.* (*Gokal Chand v. Rahman*).

open to him to plead that he had made the admission under circumstances which negatived *bonâ fides* on the part of the mortgagee or established mistake on the part of the mortgagor or misrepresentation, and even honest misrepresentation, on the part of the mortgagee. But, assuming the transaction to have been free from any such taints, we consider that it is not open to the mortgagor, who has to his knowledge received everything which he expected to get, to plead subsequently that the mortgage is incomplete simply because, while the deed recites that the consideration was the payment of Rs. 5,000, the actual sum paid was Rs. 4,000 only. In the present case, other considerations apart, we are of opinion that defendant No. 1 knew full well, at the time when he executed the deed, that he was not to receive anything more from the mortgagee than he had actually received up to that time, and that unless he can show that when he executed the deed, he was misled by the plaintiff as to the amount that he had so received, he is not entitled to plead that the mortgage is not binding upon him because the plaintiff has not proved (if indeed he was bound to prove) that the consideration passed to the uttermost pie. The sole ground upon which Mr. Shafi bases his argument upon this point is that Sardar Kalwant Singh, in his pleadings, stated that the plaintiff charged him double the value for articles supplied. But there is absolutely no evidence in support of this allegation, and Sardar Kalwant Singh did not support it by giving evidence in the case. It is said that he was very ill at the time, and that it was on that account that he was unable to give evidence. In view of the fact that he died within a few months of the date when his written pleas were filed, this explanation may well be true, but the fact remains that there is on the record nothing to substantiate this allegation. In the circumstances we agree with Mr. Shadi Lal that inasmuch as defendant No. 1 and his representatives have not been able to point out in what specific items the full consideration did not pass, the question resolves itself into this, did or did not the consideration pass as a whole, and that there is here no question as to the mortgage being incomplete because part only of the consideration actually was paid.

The really important questions in the appeal before us are as follows :—

(1) Was the defendant No. 1 a minor in March 1898, when the plaintiff's transactions with him admittedly commenced ?

(2) If the defendant No. 1 was then a minor, when did he come of age, and what proportion of the consideration for the mortgage effected on the 5th September 1899 (by which time defendant No. 1 had admittedly come of age) related to transactions during the minority of the said defendant?

(3) Can the said mortgage be upheld as a whole if it is found that part of the consideration for it was paid during the minority of the mortgagor?

(4) Assuming that the mortgagee is entitled to sue on the basis of the mortgage deed and that the mortgagor's alleged minority during part of the time when the consideration was paid does not in whole or in part affect the validity of that mortgage, has the mortgagor (or his representative) established the plea that the mortgage was (a) void because the consideration and object were unlawful, inasmuch as they related to "the stifling of a prosecution" for an offence which was not compoundable within the meaning of section 345, Criminal Procedure Code or (b) was voidable because the mortgage was effected by reason of undue influence or coercion brought to bear upon him by the mortgagee, and if so is the said transaction nevertheless valid and binding upon the mortgagor (or his representative) if it be found that the transaction was subsequently ratified by the mortgagor?

(5) If the mortgage as a whole cannot on any of the above grounds be upheld, is the plaintiff entitled under the second para. of section 19 A., Indian Contract Act to compensation for any benefits received thereunder by the mortgagor, and if so, what should be the amount of such compensation?

We proceed to deal with these points *seriatim*:

(1) There is on the record no evidence whatever as to the age of defendant No. 1 at the time when he entered upon his dealings with plaintiff *i.e.* in March 1898, but from the file of the Court of Wards relating to him (which with the consent of Counsel on both sides we sent for in order to elucidate this matter) we find that Sardar Kalwant Singh was stated to be 10 years and 11 months old in September 1888. We see no reason to doubt the accuracy of this statement, which was made at a time when the actual date of his birth was a point of some importance for the purposes of the Court of Wards but for no other ulterior purpose. It follows that Sardar Kalwant

Singh did not become a major under the provisions of the Indian Majority Act (XI of 1875), section 3, until he had attained the age of 21 years (*i. e.* in October 1898), he being a ward of the Court of Wards, and that consequently he was a minor, when the plaintiff's transactions with him commenced in March 1898. Plaintiff in his evidence has admitted that on the 30th and 31st March 1898 he gave defendant No. 1, Rs. 2,373-15-3 and that on the 16th July 1898 the balance against the latter was Rs. 4,361-5-3 and in his accounts we find an entry of the same date to the following effect, *viz* "paid in cash for which a *hundi* "for 3 months has been secured, Rs. 5,000." There are subsequent entries in these accounts, dated 1st, 6th and 15th August 1898, which relate to items totalling in all about Rs. 90. Thus we may take it that upon plaintiff's own evidence the sum of Rs. 5,090 out of the consideration for the mortgage and bond executed on the 5th September 1899 (which is alleged to have been on that date Rs. 5,956-13-6) was due in respect of transactions effected between the parties when Sardar Kalwant Singh was still a minor. Before passing on, we would here observe, that this consideration consisted partly of large sums of money advanced (or alleged to have been advanced) by the plaintiff to a youth who at the time was admittedly a student at the Aitchison College, Lahore, and also in part of silks, laces, ornaments, etc. A glance at the account which in plaintiff's own interests should have been, but was not, brought on the record, will suffice to show how utterly unnecessary such articles were to a youth who was still a student in *statu pupillari* and whose reasonable expenses were at the time being defrayed by the Court of Wards. But if the supply of these extraordinary luxuries was unnecessary in such a case, the advance of such large sums of cash as Rs. 2,000 on the 30th March 1898 and Rs. 400 on the 8th May was even more indefensible.

We refer to these items merely in order to show, that if the plaintiff had sued to recover these advances or the value of such goods upon the basis that they had been supplied to the minor and that the latter was bound to compensate plaintiff in respect thereof his suit must necessarily have failed and this too despite the provisions of section 65 of the Indian Contract Act 1872 (see *Mohari Bibi v. Dharmadas Ghose* (1)). Plaintiff, however, does not rely upon the contract

(1) (1903) I. L. R. 30 Cal. 539 P. O.

if such it can be called) by the minor to pay the amounts advanced to him or upon section 65 of the Contract Act. His claim is based on the mortgage deed executed on the 5th September 1899, when Sardar Kalwant Singh was admittedly of age, and defendant's answer to this claim is twofold. In the first place, it is urged, that the mortgage deed is wholly void, inasmuch as its object or purpose was to stifle the prosecution which the mortgagee (the plaintiff) had launched against the mortgagor for an alleged offence under section 417, Indian Penal Code. The argument on this point is that the offence was not compoundable and that any contract made with the object of dropping its prosecution was illegal and therefore void *in toto* *Kessowji Tulsidas v. Hurjan* ⁽¹⁾. *Sriranga Ohariar v. Rama Sami* ⁽²⁾. In the second place it is urged that the mortgagor was, at the time when he executed the mortgage, actually under arrest at the instance of the mortgagee, and that it was in consequence of these criminal proceedings that he was compelled to execute the said deed, which in such circumstances should be held to be voidable against him. It is contended in reply to the latter plea that even if the mortgage was the result of coercion or undue influence the mortgagor subsequently ratified the contract and reference is made in support of this argument to a document described as exhibit P. 3. We may at once dispose of this argument. There is a document of the kind upon the record, but it is quite clear that it has never been accepted as evidence in this case. It does not bear the initials of the District Judge and there is nothing to show that it has been received in evidence in the case. It was an exhibit in a former case and has been thrown upon the present record in the usual careless manner, which so frequently characterises the conduct of suits in subordinate Courts. No attempt has been made to prove it or to explain its nature, and as it is not part of the evidence in the case we must perforce reject it. In so deciding we do not think we are doing any injustice to plaintiff as this plea of "ratification" (which is based solely on this document) was never raised in the Court below, and is obviously a mere afterthought.

The questions then which we have to determine on this appeal are narrowed to these :—

⁽¹⁾ (1887) *I. L. R.* 11 *Bom.* 566.

⁽²⁾ (1895) *I. L. R.* 18 *Mad.* 189.

(1) Is the mortgage deed wholly void on the ground that its consideration was illegal ?

(2) If not, is the said mortgage voidable at the instance of the mortgagor (or his representative) on the ground that it was executed by reason of undue influence or coercion on the part of the mortgagee ?

(3) If not, is the said mortgage binding on the mortgagor (or his representative) in view of the fact that part of the consideration for it was paid at a time when the mortgagor was a minor ?

(4) If the mortgage as a whole is not (upon the third ground) binding upon the mortgagor, can the mortgagee claim compensation for any benefits received by the mortgagor in respect of this transaction ?

The first and second questions may be dealt with together. It appears that on the 27th June 1899 the present plaintiff preferred a charge under section 417, Indian Penal Code of cheating against Sardar Kalwant Singh on the ground that the latter had given him a cheque for Rs. 1,500 on the Punjab National Bank at Lahore, whereas Sardar Kalwant Singh at the time had no account with that Bank. This cheque was, of course, dishonoured and it is scarcely a matter for surprise that the present plaintiff took criminal proceedings against the drawer of the cheque. A warrant was, in due course, issued and in obedience to it Sardar Kalwant Singh appeared on the 5th September 1899 before the Magistrate. The complainant, however, did not appear and as a result the complaint was "dismissed in default." It is admitted that the mortgage-deed now sued upon was executed in the *kacheri* compound on that very day. The theory for the defence is that this mortgage-deed was executed by reason of the pressure brought to bear upon the mortgagor by means of these proceedings and that it was in order to avoid the disgrace necessarily resulting therefrom that he consented to execute it. It is on these grounds contended that the deed was, if not wholly void as being the embodiment of an agreement of which the consideration was the non-prosecution of an offence which was by law not compoundable, at all events voidable as being practically extorted from the mortgagor. The plaintiff on the other hand, while admitting that he had instituted the criminal proceedings against the defendant Sardar Kalwant Singh, and that the deed was in fact executed on the very day when the hearing of his complaint was

to have taken place before the Magistrate, urges that in point of fact negotiations with regard to the terms and conditions of the mortgage had been going on for some time previously; that the mortgagor had had ample time before the date in question to consider the draft deed and that the said draft had been in his (the mortgagor's) and his legal adviser's hands some days before the deed was executed, and that consequently there can be no question here of illegality, undue influence or coercion. Plaintiff's learned counsel argues that the reason why his client did not appear before the Magistrate to prosecute his complaint was that after the mortgage deed had been executed he was satisfied and had no further vindictive feelings against the mortgagor, in other words, that while he made no promise to drop the prosecution if the mortgagor executed the deed he was satisfied once that deed was executed and thereafter abstained from pressing his complaint.

As might be expected the evidence on this point is conflicting, but after giving every consideration to it, we are of opinion, that the defendants have not established their case. The evidence for the defence is decidedly weak in support of their contentions. Attar Singh (Defendant witness 3), a servant of Sardar Kalwant Singh, states that on the day when the deed was executed "plaintiff and his *munim* and a Police officer came to Atari and arrested him and took him to Lahore in handcuffs. They threatened to get him imprisoned and to oppose his release from the Court of Wards unless he paid them or executed a deed. They put him before the Magistrate, and an adjournment of two hours was given for a compromise. The deed was written and the case was filed."

This statement is obviously false in a very material particular. Sardar Kalwant Singh had been released from the Court of Wards in January 1899, and it was therefore absurd for the plaintiff in the following September to threaten that he would oppose his release from that Court unless the defendant was paid or a deed executed. The witness was clearly trying to exaggerate matters and we cannot accept his evidence as worthy of implicit belief. The next witness, Wirbhan, (Defendant witness 4) was also a servant of Sardar Kalwant Singh. His deposition is brief, but he asserts that "Sardar Kalwant Singh, Attar Singh" (the previous witness) "Rai Singh" and he himself went with the party when Kalwant Singh was arrested and he adds: "Two hours grace was granted

“by the Court. The deed was executed and the case was “compromised.” It will be noticed that this witness says nothing as to Sardar Kalwant Singh being in handcuffs at the time. The only other witness for the defence upon this point is Sardar Balwant Singh, the elder brother of Sardar Kalwant Singh. He admits that he has purchased from Ram Rakha Mal (defendant No. 20) part of the property now in dispute and he is consequently not an entirely impartial witness. He asserts, however, that the deed was written in the *kacheri* compound and that plaintiff threatened Sardar Kalwant Singh with imprisonment unless he agreed to his terms, and that it was only then that the latter executed the mortgage deed. He says that his brother was in handcuffs at the time, but he admits that he himself was present and that he actually attested the mortgage deed as a witness. In re-examination he added that the criminal case was not compromised; it went in default. This evidence is far from conclusive, but if it be true, it would seem to suggest that the Magistrate allowed the offence to be compounded. In answer to this evidence, the plaintiff has called certain witnesses who depose to an entirely different state of things. *Dost Muhammad*, the clerk to Mr. Herbert, swears that his employer was appearing for Sardar Kalwant Singh in these proceedings, and that two days before the date fixed for the hearing of the complaint, Mr. Herbert saw the Magistrate and informed him that there were hopes of a compromise, and that on the date of hearing Sardar Kalwant Singh (who was then not in handcuffs) told Mr. Herbert in his presence that he had settled his dispute with plaintiff. He further states that some 3 or 4 days previously Sardar Kalwant Singh had shown Mr. Herbert the draft of the mortgage-deed and that Mr. Herbert approved of it. It would have been very easy for the defence to call Mr. Herbert to rebut this evidence, had they thought fit to do so, and we can only assume that they did not produce Mr. Herbert in rebuttal because they knew that his clerk's evidence was true. *Dost Muhammad's* evidence is corroborated by that of *Karm Chand*, the petition writer who drew up the mortgage-deed. This witness swears that he drew up a draft some 3 or 4 days before the deed was executed and that he gave the draft to Sardar Kalwant Singh who said that he would like to consult his pleader about its terms. And in addition to this evidence, which shows that the deed was not executed on the spur of the moment and with the object of avoiding a criminal prosecution, we have the fact that it was presented for registration by Sardar Kal-

want Singh himself. Taking all these facts into consideration and bearing in mind that it would have been quite easy for the defendants to call Mr. Herbert to refute the evidence given by his clerk, we cannot hold it established that Sardar Kalwant Singh executed the deed without any opportunity having been given him of studying its terms or of consulting his advisers and friends with regard to it, or that it was executed under stress of undue influence or coercion. The learned District Judge who very unfortunately had to write the judgment in this case without having had the advantage of hearing the evidence has absolutely ignored the statements of Dost Muhammad and Karm Chand. Had he referred to their statements and given reasons for disbelieving them, we would have given every consideration to his opinion. As matters stand, however, we see no reason whatever for discrediting these two men, who for aught we know to the contrary, are perfectly impartial and disinterested, and whose testimony, if false, could very easily have been disproved.

We need hardly say that Mr. Shafi has not omitted to urge before us the plea that Sardar Kalwant Singh at the time when he executed this mortgage deed was a young man who had but recently attained his majority, that as such he was naturally susceptible to influences brought to bear upon him by a money-lender, especially when the latter was actively engaged in prosecuting a criminal charge against him. There is, of course, force in this argument, and we have given it our best consideration. But after giving it every weight, we do not think that it materially affects the evidence for the plaintiff. True, Sardar Kalwant Singh in September 1899 had attained legal majority only some 10 months previously, but this was due to the accidental fact that he had been a ward of the Court of Wards. Had he not been such, he would in the ordinary course have attained his majority three years previously. Nor can we regard Sardar Kalwant Singh as the ideal *ingenui vultus puer ingenuique pudoris*. A young man who gives his creditor a cheque for Rs. 1,500 on a bank with which he knows he has no account, cannot well be described as a simple-minded ingenuous youth, quite unable to look after his own affairs.

We find, therefore, that the defendants upon whom the *onus* rested have failed to prove that the mortgage deed was executed under such circumstances as would render it either void by reason of its consideration being unlawful or voidable by reason of undue influence or coercion. We have now to consider whether the mortgage deed is in whole or in part voidable or

void on the ground that part of the consideration for it undoubtedly passed at a time when the mortgagor (Sardar Kalwant Singh) was legally a minor. This is a question of some difficulty and upon it the authorities are not at one. The mortgage was executed by Sardar Kalwant Singh at a time when he was of full age but (as we already observed) the major part of the consideration passed when he was a minor in the eyes of the law.

In the case of *Indram Rama Swami v. Authappa* ⁽¹⁾ the Madras High Court held that a promissory note executed by a person on attaining majority in settlement of an earlier one, executed by him while a minor, in consideration of his having received from the obligee a certain sum of money when he was a minor, is bad for want of consideration. This case can be distinguished (as Mr. Shadi Lal attempted to distinguish it) from the present case on the ground that there the whole consideration related to transactions effected during the minority of the promisor.

But the learned Judges who decided that case distinctly held that section 25 of the Indian Contract Act was exhaustive and that it does not contemplate the case of a person who has attained majority renewing a promise given by him while a minor. To use their words :—" This section " (*i. e.* section 25 of the Act) " is of course exhaustive, and the other instances mentioned by Anson must be held not intended to be made contracts under the Indian Law. Considering that as regards agreements by infants the framers of the Contract Act departed from the English Law, as it stood at the date of the passing of that Act, and made them void, and not merely voidable, they were but consistent in not clothing renewals of such agreement after the infants ceased to be such, with enforceability." Upon this view of the law Sardar Kalwant Singh's contract, after attaining majority, would be null and void as regards such part of the consideration as passed while he was still a minor, and section 25 of the Act would have no applicability. With every respect to the learned Judges who decided the case referred to we find it impossible to accept their conclusions. It is now settled law that a promise by an infant is in law a mere nullity and void, but we fail to see how an agreement made by a person of full age to compensate wholly or in part a promisee, who has already voluntarily done something for the promisor, even at a time when the promisor was

(1) (1906) 16 *Mad. L. J.* 422.

a minor does not fall within the purview of section 25 (2) of the Indian Contract Act. As at the time when the thing was done the minor was unable to contract, the person who did it for the minor must, in law, be taken to have done it voluntarily. But he has in fact *done something* for the minor, and if words mean anything at all, surely his case must be deemed to come within the scope of the Act? If stress is to be laid on the words "the promisor" and an argument to be deduced therefrom that an infant cannot, in law, be regarded as "a promisor," we would reply that the word "already" which was deliberately inserted before the words "voluntarily done something," clearly refers to past transactions, and that we are unable to understand why that expression should be restricted merely to such as had occurred after the promisor had attained majority. Section 25 of the Act was intended to give effect to agreements which would otherwise be void as being without consideration; an infant's agreement is such, and in our opinion the provisions of the section, which are wide in terms, apply no less to such an agreement than to a contract by a major to pay for past services. In arriving at this conclusion, we find ourselves supported by a Division Bench Ruling of this Court (No. 86 P. R. 1888) (1), and by the decision of Harrington J. in *Mussanmat Kundan v. Sree Narayan* (2). To the like effect are the *dicta* in *Tillak Chand v. Sita Mal* (3), and the decision of the Bombay High Court in the case of *Jodh Raj v. Rajhvir*, referred to by Mr. Mohan Lal Khosla and Parshotam Lal Bagai in their Commentary on section 25 of the Indian Contract Act. We hold therefore that the contract as embodied in the mortgage deed of the 5th September 1899, is binding on the representatives in interest of Sardar Kalwant Singh, but merely to the extent of compensating the plaintiff for monies and articles actually supplied to that person during his minority and for any sums of money and articles supplied after he came of age. In point of fact, the whole of the consideration for this mortgage was, even upon plaintiff's own showing, paid prior to October 1898, when the mortgagor came of age. The consideration for the mortgage deed is stated to be Rs. 5,000, and we may take it that this sum represents the full amount which was paid to the mortgagor either in cash or in goods. At the time when the mortgage deed was executed, the mortgagor also executed a bond for Rs. 956-13-6, which probably represented interest on the debt, and on this bond a

(1) 86 P. R. 1888 (*Budha Mal v. Boria Missar*).

(2) (1907) 11 Cal. W. N. 135.

(3) (1873) 10 Bom. H. C. R. 214.

suit was subsequently brought by the plaintiff and an *ex parte* decree obtained. Bearing in mind the facts that the plaintiff was advancing large sums of money to a young student at college and supplying him with unlimited amounts of most unnecessary articles we do not think that we are doing the plaintiff an injustice, if we decide that he cannot claim anything more from Sardar Kalwant Singh's representatives than the principal sums for which the mortgage was effected, viz, Rs. 5,000. We are (we confess reluctantly) obliged to hold that in law the plaintiff can in the circumstances claim to be compensated for all monies and articles supplied to the minor, but we have no hesitation in saying that the plaintiff was exceedingly fortunate in getting the late Sardar Kalwant Singh to make a new contract, after attaining majority, which enables him now to recover for such monies and articles. Had the debtor made no such new contract, the plaintiff would have had no claim against his estate, nor would he have had any cause for complaint. As matters stand, the new contract made on the 5th September 1899 must, in law, be upheld, but only to the extent of compensating plaintiff for actual out-of-pocket expenses. It may well be that even the sum of Rs. 5,000 is excessive and that the debtor did not really receive value to that amount. This is by no means improbable, but there is on the record nothing to justify us in reducing that amount. The *onus* of proving that full consideration did not pass was laid, and quite rightly, on the defendants, and they have given no evidence in disproof.

We accordingly accept the appeal and give plaintiff a money decree against such defendants as are the legal representatives of the late Sardar Kalwant Singh for Rs 5,000, but we do not make this amount a charge upon the mortgaged property, and we disallow all claims for interest. We further direct that the parties bear their own costs throughout.

This decree will bind the representatives of the deceased only to the extent of any assets that may have come into their hands, and no further.

In conclusion we think it only due to the memory of the late Sardar Kalwant Singh to add that though the matter is not very clear, we gather from the record and from the statements made by Counsel before us that the debts incurred by the deceased were due not so much to licentiousness or even personal extravagance on his part as to his desire to please a young wife, whom he had married about that time and who, as we understand, was then living in Lahore. This point should, with various others already referred to, have been cleared up in the Courts below.

Appeal accepted.

No. 32.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Chevis.

KHAIRE KHAN AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

GHULAM GHAUS AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1063 of 1908.

Custom (Succession)—Succession of daughters—Naru Rajputs, Tahsil Phillour, District Jullundur—onus probandi.

Held, that the defendants, on whom the *onus* lay, had failed to prove that among Naru Rajputs of the Phillour Tahsil of the Jullundur District daughters of a sonless male proprietor succeed to the exclusion of the collaterals.

First appeal from the decrees of Lala Achru Ram, District Judge, Jullundur, dated 25th May 1908.

Muhammad Shafi, for appellants.

Hukam Chand, for respondents.

The judgment of the Court was delivered by:—

CHEVIS J.—The genealogical tree (omitting certain unnecessary names) will be found appended to this judgment. The property in dispute is the estate of the late Muhammad Bakhsh, whose widow in 1888 'gifted the bulk of it, 195 *ghumaons*, 7 *kanals*, 13 *marlas*, to Ghulam Ghaus, her daughter's son, keeping 12 *ghumaons* only for her own maintenance. On her death in 1905, the remaining 12 *ghumaons* also were mutated in favour of Ghulam Ghaus. Plaintiffs, Ghulam Kadir, Khaire and Dullah, sue for possession. Sundar Singh, defendant No. 2, is a party by reason of a mortgage of some of the land having been effected by Ghulam Ghaus in his favour.

The District Judge has dismissed the suit, holding that the gift was assented to and that plaintiffs are now estopped from contesting it and that Ghulam Ghaus has held long adverse possession, and holding further that by custom Ghulam Ghaus, as daughter's son of the last male owner, has a right to the exclusion of collaterals so distantly related as the plaintiffs. The plaintiffs appeal.

In the first place we may remark that the question of adverse possession does not arise; the case is clearly governed by Article 141 of the second schedule of the Limitation Act, 1877, and the suit, having been brought within 12 years

from the death of the widow of the last male owner is within time.

We will next deal with the question of custom, as if the District Judge's finding on this point is to be upheld there will be no need to consider other matters.

The parties are Naru Rajputs of the Phillour Tahsil of the Jullundur District. The District Judge has decided in favour of the daughter's son on the strength of 179 P. R. 1889 (1) and an unpublished Judgment of this Court (C. A. 971 of 1906). The latter Judgment is a very short one, and simply follows 179 P. R. 1889 (1). In 179 P. R. 1889 (1) the dispute as to succession was decided in favour of the daughters who were held to be entitled to succeed in the absence of male descendants of their father's great grandfather, on the strength of entries in the *Riwaj-i-am* and *Wajibul-arz*. But it is to be noted that the parties in that case were Naru Rajputs of the Hoshiarpur tahsil, and though it may be true, as is urged before us, that the Hoshiarpur Naru Rajputs originally came from Jullundur, we cannot presume that the tribal custom is now the same in both districts. Though it is no doubt correct to say that persons carry their own customs along with them, it does not follow that they retain those customs unchanged after long residence amongst other tribes holding different customs. Therefore, taking 179 P. R. 1889 (1) to be a correct ruling (though the learned Counsel for the appellants challenges it on the ground that it wrongly differs from 80 P. R. 1875 (2), and incorrectly states that the learned Judges who delivered the last mentioned ruling differed as to the meaning of the word *karabati*), we are unable to hold that it is applicable to the case of Naru Rajputs of the Jullundur district. We note that in a later decision relating to Naru Rajputs of the Hoshiarpur district, 98 P. R. 1891 (3), the real meaning of the term *karabati* is further discussed, but it is unnecessary to follow the matter further, as we are not dealing with Hoshiarpur Rajputs.

We have no *Riwaj-i-am* to guide us in the present case but we note that in Roe's "Tribal Law in the Punjab" we find on page 135 the remark, "In Phillour all the tribes say "that agnates of any degree exclude daughters," and even the resident son-in-law seems not to be a recognized institution in this tahsil, according to the above authority.

(1) 179 P. R. 1889 (*Ranjhi Khan v. Mussummat Kamun*).

(2) 80 P. R. 1875 (*Musammal Sahab Jan v. Karm Bukhs*).

(3) 98 P. R. 1891 (*Mussummat Jiwi v. Gahiya*).

Various rulings have been cited for the respondents. Copies of several judgments referred to are on the record, but on examination they seem to afford no help to the respondents. In exhibit D. 4 it was held that collaterals up to the fifth degree excluded the daughter. Exhibit D. 5 favours collaterals even up to the seventh degree. Exhibit D. 6 was a case of gift by the male proprietor to a daughter. In Exhibit D. 7 the collaterals failed as they could not establish the degree of relationship. Exhibit D. 8 is a Hoshiarpur case, and here too the degree of relationship was not proved. In Exhibit D. 9 the case was remanded for a further enquiry as to custom; the final result of that enquiry has not been disclosed. As to such rulings as 69 *P. R.* 1878 ⁽¹⁾; 172 *P. R.* 1889 ⁽²⁾, and 38 *P. R.* 1870 ⁽³⁾; which have been quoted in arguments before us, we fail to see how cases relating to the customs of weavers, Syads and Brahmins can assist us in deciding the present case. The oral evidence in the present case is also of no value, as the instances cited refer to gifts by the male proprietor or to contests between daughters and very near agnates.

The *onus* of proving that the daughter succeeds rests on the defendants, and we hold that they have failed to discharge the *onus*. We are therefore unable to uphold the decision of the learned District Judge as to custom.

That the widow had any power to make such a gift has not been argued before us, so it remains only to see whether the plaintiffs are estopped from contesting.

Nathe Khan was the nearest reversioner at the time of the gift, but the mutation proceedings (see pp. 4-11 of the paper book) do not show that he assented; all that appears or that he reported the death of Ali Sher on 26th January 1888. This was just prior to the gift by Mussammat Khairan.

Mussammat Jiwan, mother of Dullah and Khaire and grandmother of Ghulam Ghaus, no doubt assented to the gift, but such assent could not bind her minor sons. Amir, father of Ghulam Kadir, is shown as objecting, but a former statement of his, dated 21st April 1888, is referred to by the Naib Tahsildar as a statement of assent. That statement is not part of the mutation proceedings apparently. It has not been produced in the present case, and we are unable therefore to see what was the exact statement referred to

(1) 69 *P. R.* 1878 (*Mussammat Rahia v. Mahomed Baksh*).

(2) 172 *P. R.* 1889 (*Mussammat Fatima v. Ghulam Muhammad Shah*).

(3) 38 *P. R.* 1870 (*Mansa Ram v. Punnoo*).

or how far the Naib Tahsildar was justified in saying, Amir had assented. No assent of Amir is therefore proved.

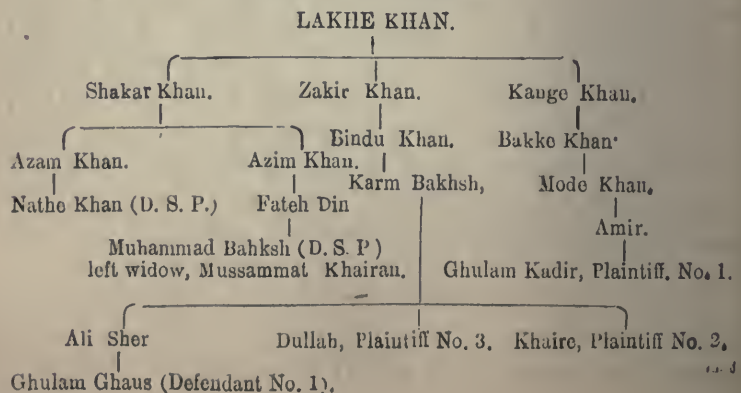
As to any of the plaintiffs acting as Sarbarah for Ghulam Ghaus while he was a minor, this relates only to the Lambar-darship and has nothing to do with the gift.

Turning to the mutation proceedings which took place on the death of Mussammatt Khairan (see page 14), we still find no assent so far as Ghulam Kadir is concerned, but the assent of Khaire and Dullah is clearly entered there, and this we consider estops them altogether. They there consented to Ghulam Ghaus getting the residue of the estate which he had not already acquired by gift. It may well be that they assented because Ghulam Ghaus was then betrothed to Dullah's daughter, though the engagement has since been broken off, but their assent was clearly given, and we fail to see how they can be allowed to change their position now that Ghulam Ghaus has been in possession and has acted as full owner, mortgaging a part of the estate. As to the remarks of the District Judge about a family arrangement, we note that no assent is proved except on the part of Dullah and Khaire, and their mother, and we fail to see how their assent can be binding on Ghulam Kadir.

The result is that we find that Ghulam Kadir, whose share is half, is not estopped but that the other plaintiffs are estopped. We so far accept the appeal as to give Ghulam Kadir a decree for possession as owner of one-half of the land in suit, dismissing the claim of Khaire and Dullah. As the plaintiffs sued jointly and as the claim has succeeded to the extent of one-half only, we leave the parties to bear their own costs throughout.

Appeal accepted.

Appendix to Judgment.



Full Bench.

No. 33,

Before Hon. Sir Arthur Reid, Kt., Chief Judge, Hon. Mr.

Justice Robertson, Hon. Mr. Justice Rattigan.

KHIALI RAM AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

GULAB KHAN—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 348 of 1905.

Limitation—Suit by reversioners for possession of land mortgaged by male owner more than 12 years before suit and subsequently sold by his widow—merger of mortgage in sale—Punjab Limitation Act, I of 1900.—Indian Limitation Act, XV of 1877, Article 141.

On 2nd December 1886 R. K. mortgaged to T. 28 bighas of land by way of simple mortgage, the mortgagor retaining possession. R. K. died about 1887. On 7th November 1899 his widow sold the said land and some other land in addition to the said T. for Rs. 2,000 (part of which (Rs. 1,200) consisted of the sum due under the prior mortgage made by R. K.) and delivered possession. On 7th December 1899 T. sold the said land to K. R. R. K.'s widow died about the end of 1901, and on 2nd October 1903 the plaintiff, a reversioner of R. K., brought the present suit for possession against the vendee and his alienee.

Held by the Full Bench, that inasmuch as the defendants' mortgage from R. K. gave them no right to possession and they had obtained possession solely by virtue of the sale in their favour by R. K.'s widow, the suit was governed by the provisions of Article 141 of the Second Schedule of the Indian Limitation Act, 1877, and not by the Punjab Limitation Act, 1900, and was consequently not barred by limitation.

Held also, that the mortgage by R. K. did not merge in the sale by the widow, and as a suit for a declaration that such mortgage was void except for the lifetime of R. K. would long since have been barred under Article I of the Schedule to the Punjab Limitation Act, 1900, the plaintiff was also debarred from challenging it in this suit.

Further appeal from the decree of Kazi Muhammad Aslam, C. M. G., Divisional Judge, Ferozepore Division, dated the 1st February 1906.

Ishwar Das and Gobind Ram, for appellants.

Morrison, for respondent.

This was a reference to a Full Bench made by Hon. Mr Justice Robertson and Hon. Mr. Justice Rattigan, JJ.

The order of reference was as follows :—

The facts are given fully in the judgments of the lower 20th Dec. 1905. Courts. This was a suit by reversioners to contest an alienation

by Mussammat Bakhshi, widow of one Rustam Khan, by which she sold the land in question for Rs. 2,000 on 7th November 1889. The consideration was a previous mortgage by Rustam Khan himself, dated 2nd December 1886, for Rs. 1,200 with some interest and Rs. 700 on account of a mortgage by herself, Rs. 600 being alleged to have been borrowed for her husband's "chalan." We may say at once that no necessity has been proved for this last item. It is however alleged and with force, that the alienee can fall back on the mortgage of 2nd December 1886, and it is clear that he can do so. The decision of the learned Divisional Judge that this mortgage has merged in the sale is clearly unsustainable, and counsel for the respondent did not attempt to support it.

It is then urged that the alienation by mortgage by Rustam Khan himself of 2nd December 1886 for Rs. 1,200 cannot now be called in question, as any suit to contest it is barred by time. This question is one which is constantly recurring and is of very great importance.

Rustam Khan alienated the land by mortgage on December 2nd, 1886. He died sometime before October 1887. His widow died in 1902 or at the end of 1901. Clearly the plaintiff could not sue for possession until after the widow's death, as she was admittedly holding the estate on the ordinary widow's tenure. This is admitted by both sides. The Punjab Limitation Act came into force on 1st June 1900, so that it governs this case, Full Bench 90 of 1904 (1). Under the Punjab Limitation Act the period of limitation for a suit by a son or reversioner of a male proprietor to have an alienation of ancestral land made by such proprietor declared void except for the life of the alienor, is 12 years...from the time when the facts first became known to him, when the alienation is with possession and when the alienation is, as in this case, a mortgage without possession from the date of alienation.

A suit for a declaration might therefore possibly lie in the case of a mortgage with possession if it could be shown that the facts, entitling the plaintiff to sue, became known to him within 12 years of the filing of the suit. Here the mortgage being without possession, the period of limitation is 12 years from the alienation itself, whether or not the claimant knew of it within 12 years of its taking place. But to obtain a declaration would be useless to him, even if this had been

(1) 90 P. R. 1904 F. B. (*Sahib Dad v. Rahmat*).

a mortgage with possession, because it is further provided that the period of limitation for a suit by the heir of a male proprietor, for possession of ancestral land alienated by such proprietor during his lifetime, is 12 years, if a declaratory suit has been obtained, from the date of the alienor's death. As Rustam Khan died in December 1887, and this suit was not filed till 2nd October 1903, the suit would still be barred even if a declaratory decree were obtained, if that were possible. But if no declaratory decree has been obtained, the period is 12 years from the time when the alienation first became known to the plaintiff, or the death of the alienor, whichever event happens *first*. Clearly more than 12 years have elapsed since the death of the alienor, and the suit of the plaintiff would be barred without his right to sue ever having accrued, even though he might never have been aware of the alienation until quite lately. It appears, further, though this does not apply to the present case, that even had the plaintiff sued within time for a declaratory decree and obtained it, it would still be perfectly useless as he could not have brought a suit for possession after 12 years had expired from the death of the alienor. The only possible contention which might obviate some of the peculiar results of the new law of mutation would be to hold that if the widow was not in possession a suit for possession would lie in her lifetime, but this would only be of avail in certain cases. In the case before us under the Act I of 1900 it appears to us clear, that the suit is time-barred as regards the power to contest the validity of the mortgage by Rustam Khan himself in 1886. My brother and I are quite agreed upon the point, but it is novel and of very great importance, we think that it ought to go before a Full Bench and we refer it on account of its extreme importance, and the anomalous results of the Act I of 1900, Punjab, which has to be applied.

Referred to a Full Bench accordingly.

The judgment of the learned Judges, who constituted the Full Bench, was delivered by :—

RATTIGAN J.—Before dealing with the question referred to 23rd June 1906. the Full Bench for consideration, I think it will clear the ground and simplify matters, if I briefly state the facts of the case.

On the 2nd December 1886, one Rustam Khan mortgaged to Tara 28 *bighas* of land by way of simple mortgage, the mortgagor retaining possession. Rustam died about 1887, and

after his death (i. e., on the 7th November 1889) his widow sold the said land and some other land in addition to the said Tara for an alleged consideration of Rs. 2,000, part of which consisted of the sum due under the prior mortgage by Rustam Khan. Possession was given under the sale to the vendee. Then, on the 7th December 1899, Tara's sons sold the whole of the said property to Khiali Ram for Rs. 3,000.

Rustam's widow died about the end of 1901, and plaintiff, as the reversionary heir of Rustam Khan, sues Khiali and Tara's sons for possession of the land sold by the widow in 1889. The Division Bench was of opinion that under the provisions of the Punjab Limitation Act, the plaintiff's suit for possession was barred before his right to sue for possession accrued, he admittedly having no right to possession during the lifetime of the widow. The result being so anomalous and so unfair, the question whether the suit was so barred was referred to a Full Bench.

As one of the Judges who made the reference, I may at once say, that upon better and fuller consideration, I have come to the conclusion that the suit is not barred and that our former opinion was based upon a fallacy. I quite admit that in some cases anomalous results and serious injustice may and probably will ensue if the provisions of the Punjab Limitation Act, 1900 are to be construed in their ordinary natural sense. To give a concrete example. A mortgages land with possession to B.—C. the reversioner obtains a declaratory decree within the specified time. A. dies leaving a widow X., who is entitled to possession of the land for her life. X. dies 13 years after the death of A. In this case C.'s right to sue for possession is barred, though his cause of action, *qua* such suit, only accrued after the death of the widow. This case and similar cases may occur any day, and in view of the extraordinary results and grave injustice that are not only possible but probable if the provisions of the Act are to be given their plain meaning, I would venture to suggest that the amendment of the Act is a matter deserving the early consideration of the Local Government. In the case before us, however, I do not see that there is any hardship or anomaly.

The defendants' mortgage from Rustam Khan gave and gives them no right to possession and they have obtained possession solely by virtue of the sale in their favour by Rustam Khan's widow. Plaintiff now sues for possession, and this suit is, I think, one falling under and governed by the pro-

visions of Article 141 of Act XV of 1877. The sale by the widow can, of course, be impeached within the specified time by the reversioner, and unless it can be established by the vendee that there was necessity for the alienations, the reversioner is entitled to recover possession. If, on the other hand, the sale was for necessity, it is valid, and the vendee is entitled to retain the possession which he obtained by reason of it. It has been found in this case that part of the consideration money at all events for the sale is not proved to have been raised for necessity, and that so far the sale cannot be upheld. But defendants' plea is that they can fall back on the mortgage by Rustam Khan, which they were entitled to keep alive in their own interests and which did not merge in the sale by the widow.

It seems to me, however, that the only question in a case of this kind is, whether or not the sale by the widow was for necessary purposes. If it was, then the sale is valid in its entirety; if, however, no part of the consideration money was paid for necessary purposes, the sale would be wholly invalid as against the reversioners; but if the sale was in part only for necessity, then under the rule of practice which obtains in this Province in these cases, the Court would be justified in converting the sale into a mortgage in respect of such part of the consideration money as was for necessity. In the present case the widow was *prima facie* justified in paying off her deceased husband's mortgage. It is contended however for the reversioner (plaintiff) that proof can be given to show that the mortgage by Rustam Khan was a fictitious transaction, and otherwise unenforceable against the reversioners, and that the widow was not entitled to pay it off. It is clear that this contention is untenable, for a suit for a declaration that such mortgage was void, except for the lifetime of the alienor, would long since have been barred under Article 1 of the schedule to the Punjab Limitation Act, 1900, and as the mortgage cannot be challenged directly, it cannot, I think, be the law that the same alienation should be open to impeachment by indirect means. The ruling of this Court in No. 71 P. R. 1898 (1) is in accord with this view, which is, I venture to think, both logical and legal.

I would accordingly reply to the reference that (a) plaintiff's suit is not barred by any provision of law; but (b) tha

(1) 71 P. R. 1898 (*Devi Ditta v. Pareman*).

plaintiff cannot recover possession except on payment of the sum due to the defendants on the mortgage by Rustam Khan.

26th June 1906.

SIR ARTHUR REID, C. J.—I concur.

ROBERTSON, J.—The reference to the Full Bench is not as well worded, as it might have been, I fear.

What occurred was this :—

On 2nd December 1886, Rustam Khan mortgaged 528 *kanals*, 15 *marlas* for Rs. 1,200 to Tara, mortgagee, with a clause by way of conditional sale to take effect if the land were not redeemed in three years. This was registered.

Rustam Khan died in December 1887, and his widow sold the land to Tara, in discharge *inter alia* of this liability, on 7th November 1889.

Tara pleads in effect. The land is in my possession under a sale from Rustam Khan's widow. But a part of the consideration is the previous mortgage by Rustam Khan. That is clearly valid consideration, because you are now barred from suing, by limitation, for a declaration that it does not affect your interests, consequently the sale is at least good as a mortgage charge against you. Is not the plaintiff now barred by limitation from contesting the validity of the mortgage, except on grounds which the mortgagor could have urged and therefore barred from contesting it in this suit? And if he gets a decree for possession, must it not be on condition of paying off the mortgage charge of 2nd December 1886, which plaintiff is now debarred from contesting?

I think this is so, and concur with my brother Rattigan accordingly.

The judgment of the Division Bench was delivered by :—

15th Decr. 1906.

ROBERTSON J.—The decision of the Full Bench on the reference made to it in this case is that the plaintiff cannot recover possession except on payment of the sum due to the defendants on the mortgage by Rustam Khan.

Decree accordingly.

No. 34.

Before Hon. Mr. Justice Shah Din.

DASWANDI—(PLAINTIFF)—APPELLANT,

*Versus*MAHANT KRISHEN DEV AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 558 of 1910.

*Custom (Alienation)—Brahmans of mauza Dharmsala, tahsil Una, district Hoshiarpur—Hindu law.**Held*, that the parties to the suit, Brahmans of mauza Dharmsala in tahsil Una, district Hoshiarpur, were governed in matters of alienation by agricultural custom and not by Hindu law.*Further appeal from the decree of J. P. Thompson, Esquire, Divisional Judge, Hoshiarpur Division, dated the 19th February 1910.*

Appellant in person.

Umar Bakhsh, for respondent.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—The facts are very fully stated in the judg- 23rd March 1910.
ments of the Courts below. The sole question for decision in this appeal is whether the parties, who are Brahmans of mauza Dharmsala in tahsil Una, district Hoshiarpur, are governed in matters of alienation by Hindu law or by custom. Defendant No. 1, who is brother of the plaintiff, gifted half of his ancestral land amounting to 20 kanals 5 marlas in favour of defendant No. 2, Mahant Krishen Dev, manager of the Thakardawara at Dharamsala; and the plaintiff has brought the present suit for a declaration that the gift in question shall not affect his reversionary rights after the death of the donor.

The first Court held that the parties were governed by custom and that the donor's powers of alienation were restricted, and it therefore granted the plaintiff the declaration prayed for. On appeal the Divisional Judge has held that the plaintiff has failed to establish that the parties were governed by custom, and that under Hindu law, which thus furnished the rule of decision, the donor had an unrestricted power of alienation. The learned Judge has, therefore, dismissed the plaintiff's suit.

After hearing the respondents' pleader, I think that the view taken by the Divisional Judge is erroneous, and the decree of the first Court must therefore be restored. The facts found by both the Courts are :—

(1) that the village in which the land is situated was founded by the ancestor of the parties about 9 generations ago ;

(2) that the Brahman proprietors who reside in the village constitute a compact community ;

(3) that they till the land in their possession with their own hands ; and

(4) that the *wajib-ul-arz* of 1852 and that of 1869 very materially restrict the power of alienation, except for necessity.

In view of these facts, I think the first Court was right in holding that the initial presumption was that the parties followed custom and not their personal law ; and judging from certain passages in his judgment the learned Divisional Judge evidently was not disposed to differ from that view. For instance, he says—" It is true the community is a compact one, " and the Brahmans till the soil themselves, and these facts " would be sufficient to raise the presumption that they " follow custom, were it not for other circumstances which " seem to me to rebut it." The learned Judge then proceeds to discuss the circumstances which, in his opinion, were sufficient to rebut the initial presumption which existed in plaintiff's favour. Between 1881 and 1909 fifty-five alienations took place in the village and apparently they have not been objected to. Further an ancestor of the parties, named Nikadar Das, founded a temple in the village very many years ago, which is held in reverence by a large number of pilgrims, and with which possibly (though the Divisional Judge does not definitely say so) some of the Brahman proprietors of the village have kept up some sort of connection. These facts, however, are hardly sufficient to show that the parties do not follow custom. Of the 55 alienations spoken of by the Divisional Judge, 37 were by way of a mortgage and in only 14 cases were the alienees non-Brahmins. Only one permanent transfer of land to a non-Brahman has been proved ; and there is nothing to shew that the tribal ties of the proprietary body have been in any way broken.

The *wajib-ul-arz* of 1852 and 1869 contain provisions expressly restrictive of a proprietor's power of alienation and a great deal of weight must attach to those provisions. The Divisional Judge notes that the *Rivaj-i-am* is against the unlimited rights of alienation among Brahmans, though I myself have not been able to verify this, as no extract from the

Riwaj-i-am has been placed on the record. Further, it is proved that in this village collaterals have succeeded in some instances to the exclusion of daughters, which shows that strict Hindu law is not applicable to the parties in matters of succession. The decision of this Court reported as No. 1, *P. R.* 1910 (1) is clearly distinguishable from this case, which is analogous in some of its aspects to No. 21, *P. R.* 1896 (2).

For the above reasons, I hold that the parties in this case follow custom and not Hindu law, and that under that custom defendant No. 1 was not competent to make the gift in dispute in favour of defendant No. 2. I therefore accept this appeal and reversing the decree of the lower Appellate Court, restore that of the first Court with costs throughout.

Appeal accepted.

No. 35.

Before Hon. Mr. Justice Rattigan.

CHARLES LOUIS DREYFUS AND CO.—(PLAINTIFFS)—
PETITIONERS,

Versus

GURDITTA MAL—(DEFENDANT)—RESPONDENT.

Civil Revision No. 1833 of 1910.

Arbitration—Application for reference to arbitration—Several causes of action joined in one application—Nomination of arbitrator by Court—Difference between the old and new Code—Civil Procedure Code, Act V of 1908, section 141, Schedule I, Order 2, rule 3 and clause 17 of the Second Schedule—Civil Procedure Code, XIV of 1882, section 523—Material irregularity.

Held, that order 2, rule 3 of the First Schedule, read with section 141, of the Civil Procedure Code, 1908, enables a Court to allow plaintiffs to join several causes of action in one application to file in Court agreements to refer to arbitration under clause 17 of the Second Schedule.

Held also, that section 523 of the old Civil Procedure Code, 1882 differed materially from the provisions of clause 17 of the Second Schedule of the present Civil Procedure Code, 1908, inasmuch as under the former it was necessary that the arbitrators should be named in the agreement, but in clause 17 there is no reference to "arbitrators named" and the sole provision is that the reference is to be to the arbitrators "appointed in accordance with the provisions of the agreement." Where a Court, in contravention of the express agreement between the parties and the imperative terms of the Civil Procedure Code, appointed an arbitrator who did not come under the terms of that agreement, it committed an irregularity which materially prejudiced the plaintiffs.

(1) 1 *P. R.* 1910 (*Mussammatt Maya v. Gurdit Singh*).

(2) 21 *P. R.* 1896 (*Uttam Singh v. Jhanda Singh*).

Petition under section 70 (a) (b) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of W. LeRossignol, Esquire, Divisional Judge, Amritsar Division, dated the 7th March 1910.

Ganga Ram, for petitioner.

Duni Chand, for respondent.

The judgment of the learned Judge was as follows :—

6th March 1911.

RATTIGAN, J.—Messrs. Louis Dreyfus and Co. applied under clause 17 of the Second Schedule of the Civil Procedure Code to the Munsiff 1st Class, Amritsar, that a certain agreement in writing between them and the defendant should be filed in Court and that an order of reference should be made to arbitrators to be appointed in accordance with the provisions of the said agreement. Admittedly, there were three such agreements between the parties all in precisely similar terms, executed within a short period of each other and relating to what was, to all intents and purposes, one transaction. One of the terms of these agreements (paragraph 17 of the Indents) was to the effect that “In case of any dispute whatsoever arising under this contract, the same is to be referred to two European merchants residing in Karachi, each party having the right to nominate one arbitrator,” etc.

Plaintiffs in their application duly nominated as their arbitrator a European merchant residing at Karachi, but the defendants though called upon to do so, failed to nominate their arbitrator. The Munsiff was of opinion that the terms of paragraph 17 of the contract were “ambiguous” and that they should have “contained the names of arbitrators.” He accordingly held that it was open to him to nominate one Amritsar gentleman to act as arbitrator on behalf of the defendant. He further held that in the present case the three different causes of action could not conveniently be tried together and that separate arbitrators should be appointed with regard to each of the three different contracts. This latter point is easily disposed of. It is true that there are three separate contracts, but as I have already pointed out, they are all intimately connected and even Mr. Duni Chand (for the respondents) was forced to admit that from the point of view of convenience to all parties, it would be better that one set of arbitrators should determine the disputes between the parties upon all three contracts. This is so obviously in the interests of all parties that it would be a matter for regret if the Court was compelled to hold that a separate application

must necessarily be made with respect to each agreement, and that in each case separate arbitrators must be appointed. Fortunately I am not obliged to hold this, as it is clear that order 2, rule 3, read with section 141 of the Civil Procedure Code, enables the Court to allow the plaintiffs to join their several causes of action in one application. I decide, therefore, that the plaintiffs were justified in asking the Court to take action in one application, upon all three agreements.

The other question seems to me to be equally easy of decision. Paragraph 17 of the contract between the parties is clear and precise. The matter in difference between the parties is to be referred to the arbitrament of two European merchants, and clause 17 of the Second Schedule of the Civil Procedure Code imperatively enacts that the Court "shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement." Section 523 of the Civil Procedure Code of 1882 differed very materially from the provisions of clause 17 of the present Code, inasmuch as under the terms of the former it was necessary that the arbitrators should be "named" in the agreement. It was accordingly held, in cases decided, under the former Code, that unless arbitrators were therein "named" (either personally or *ex-officio*) effect could not be given to the agreements to refer—*Fazul Bhoj v. The Bombay and Persia S.N.C., Limited* ⁽¹⁾ and *Nand Lal v. Alexander Atkinson* ⁽²⁾. But in clause 17 of the Second Schedule of the present Code there is no reference to arbitrators "named" in the agreement to refer, and the sole provision is that the reference is to be to the arbitrator "appointed in accordance with the provisions of the agreement." This provision is, in my opinion, mandatory, and if the agreement makes provision (as the present agreements do) for the appointment of an arbitrator the Courts are bound to give effect to it. It is true that no persons are specifically "named" in the agreement as the persons to be appointed arbitrators, but it is absurd to say that for this reason the agreement is "ambiguous." *Id certum est quod certum reddi potest*, and it is quite possible for the parties to nominate certain European merchants residing at Karachi as their respective arbitrators.

I accordingly hold that the Munsiff committed an irregularity, which has materially prejudiced the plaintiffs, in holding that he could in contravention of the express agreement between the parties and the imperative terms of the Civil Procedure

⁽¹⁾ (1896) I. L. R. 20 Bom. 232.

⁽²⁾ 95 P. L. R. 1905.

Code appoint as an arbitrator a person who was not a European merchant residing in Karachi. Defendants whether wisely or unwisely agreed to this condition, and it is no answer for them to now plead that they do not know any European merchant in Karachi and that an arbitrator in Amritsar will be more likely to understand the case. Parties must adhere to contracts made by them with full understanding of all the terms and must not be allowed to resile from agreements, simply because they subsequently find it to their interest to do so. The law is definite and leaves no option to the Court. The arbitrator must be appointed in accordance with the provisions of the agreement.

I accordingly accept this petition and set aside the order of the Munsiff, dated the 21st December 1909. The Munsiff must now proceed to deal with the plaintiffs' application in accordance with law and the foregoing observations. Respondents must pay the costs of proceedings in this Court.

Revision allowed.

No. 36.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon. Mr. Justice Kensington.

THE EAST INDIA RAILWAY COMPANY—(DEFENDANTS)—
PETITIONERS.

Versus

L. MOTI SAGAR—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 3213 of 1910.

Platform ticket—persons seeing friends off—Preference—Indian Railways Act, IX of 1890, section 42—rule 29.

Held, that rule 29 of the rules framed under the Railways Act empowers a Railway Company to exclude from, or admit, on certain conditions including payment for admission, to their platforms persons who are not *bona fide* passengers and have not business on the Railway premises.

Held also, that a person who goes to a Station merely to see a friend off is not one having business on the railway premises within the meaning of that rule.

Held further, that the provisions of section 42 (2) as to preference apply only to traffic facilities, *i.e.*, to rolling stock and passengers, animals and goods, and not to persons seeing friends off.

Petition under section 25 of Act IX of 1887, for revision of the order of Khwaja Muhmud Husain, Registrar, Small Cause Court, Delhi, dated the 8th August 1910.

Oertel and Herbert, for petitioners

Shadi Lal, Pestonji Dadabhai and Durga Das, for respondent.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C.J.—This is an application under section 25 of the Small Cause Court Act, and the question for consideration is whether the respondent is entitled to recover from the E. I. R. Co. six pies paid by him for a ticket admitting him to the platform of the Delhi Railway Station. The Registrar of the Small Cause Court gave the plaintiff-respondent a decree. 17th March 1911.

The respondent's case is that he went to the station to see a friend off by the Bombay Mail; that on attempting to go on to the platform he was stopped by a Ticket-Collector who demanded his ticket, that he told the Ticket Collector that the platform ticket was unnecessary and asked him to refer to the Station Master; that the Ticket Collector refused to do so; that an Inspector informed him that he could not have access to the platform without a platform ticket; that he again remonstrated unsuccessfully and that he eventually purchased a platform ticket under protest.

Counsel for the Railway Company contended that the station was the property of the Company and that the respondent had to establish his right to enter it. Rule 29 of the rules for the guidance of the public and railway officials, published on page 1971 of the Supplement to the *Gazette of India*, 1906, runs as follows:—

“A railway administration may exclude from the station platform or any part of the railway premises any person not being a *bond fide* passenger nor having business on the railway premises.”

This rule was admittedly made applicable to the E. I. R. by a resolution No. 35 R. T., pages 319 and 320 of the *Gazette of India*, 1907. The respondent was admittedly not a passenger, and we have no hesitation in holding that his desire to see his friend off did not constitute *business* within the terms of the rule. It was admitted that his presence was unnecessary so far as his friend's departure was concerned and that his friend did not require any assistance from him. The point is, in our opinion, so obvious that it does not require any further consideration or authority.

Counsel for the respondent contended that the demand of payment for a platform-ticket was illegal because the resolution of the Government of India published at pages 18 and 19 of the Supplement to the *Gazette of India*, 1884, constituted a

rule passed under the Railway Act, IV of 1879, and no such rule was published under the Act now in force, and must therefore be held to have been repealed or to have lost its force. The resolution runs as follows:—

“ The overcrowding of the platforms of important railway stations at train times by persons who are non-travellers has frequently been found to interfere with the proper working of such stations, and in view to lessening the inconvenience, both to the public and to the station staff, the railway authorities have in some cases introduced a system of issuing platform tickets, on payment of a nominal fee by means of which persons desiring to see their friends off, or to meet them on arrival, can obtain admission to the railway platform.

“ (2) The experiment has been tried with success at the Lahore station of the Sind, Punjab and Delhi Railway and it is believed that the system is being adopted at certain large stations on other railways; but, as doubts have been raised as to the legal right of the railway authorities to issue such passes, His Excellency the Governor-General in Council is pleased to rule that in future, when the railway authorities desire to exclude all but ticket-holders from railway platforms, the intention shall be duly notified in the railway time-tables, and a printed notice to that effect, specifying the place where such tickets are obtainable and their cost, shall be drawn up with reference to sections 3 (c) and 41 of the Indian Railways Act, No. IV of 1879, and posted up in a conspicuous place outside the station.

“ (3) Such a notice, His Excellency the Governor-General in Council is advised, would be a sufficient warning off to justify the officers of a railway in preventing any person from entering a railway platform without a ticket and in proceeding against him, if necessary, under section 41 of the Act above quoted.

“ (4) It will be distinctly understood that the Government of India considers a restriction of the nature herein referred to as undesirable, excepting where there is well established and absolute necessity for it and that every facility should be given for obtaining tickets of admission, not only before the departure, but also before the arrival of a train.”

This resolution merely provides the conditions under which the railway authorities may “ exclude all but ticket-holders from railway platforms.” Those conditions being due notice of the intention to exclude and facilities for the purchase of

ticket of admission. It has not been contended that the conditions have not been complied with. Counsel for the respondent also relied on section 42 of the Railways Act, as prohibiting exclusion of some persons and the admission of others. The section is inapplicable to the present case. It prescribes the duty of railway administrations to arrange for receiving and forwarding traffic without any reasonable delay and without partiality and forms the part of Chapter V of the Act which is headed "Traffic facilities." Section 3 (11) of the Act defines "traffic" as including rolling stock of every description as well as passengers, animals and goods. This definition does not include the respondent. Sections 66 and 68 cited for the respondent do not affect the case. The fact that the possession of a proper pass or ticket or the permission of a railway servant is a condition precedent to entering a railway carriage for the purpose of travelling therein as a passenger does not qualify rule 29 cited above, and the existence of that rule justifies exclusion even if it were held that the station platform is not private property. The right to exclude obviously entails the right to admit on certain conditions including the condition of payment for admission. In *Perth General Station Committee versus Ross* (1) the House of Lords held that, apart from any facilities granted by the Railway Commissioners, railway companies have the right of excluding from their stations all persons excepting those using or desirous of using the railway, and may impose upon the rest of the public any terms they think proper as the conditions of admittance.

Imperatrix v. Vanmali (2) and *Cowasji Merwanji Shroff v. G. I. P. R. Company* (3), indicate that railway companies have a right to exclude the public from railway premises. Section 3 (4) defines the word "railway" as including all stations, offices, warehouses, etc., constructed for the purposes or in connection with a railway and section 122 prescribes penalties for unlawfully entering upon a railway and for refusing to leave after unlawful entry. In our view of the merits of the case it is unnecessary to consider the further contention for the railway company that the suit for the recovery of the amount paid would not lie, even if it were held that the demand of payment was unlawful, but we may note that the authority cited for the contention, *Manchester, Sheffield and Lincolnshire Railway Company v. Denaby Main Colliery Company* (4), dealt with a specific provision of the Railway and Canal Traffic Act of 1854, precluding a suit,

(1) (1897) *L. R. House of Lords* 479.(2) (1898) *I. L. R.* 22 Bom. 525.(3) (1902) *I. L. R.* 26 Bom. 609.(4) *L. R.* 13 Q. B. D. 674.

We allow the application, set aside the decree, and dismiss the suit with costs here and below.

Revision allowed.

No. 37.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon. Mr. Justice Kensington.

Haji and Others—(DEFENDANTS)—APPELLANTS,

Versus

GHULAM SHAH—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 394 of 1911.

Pre-emption—agreement granting occupancy rights—Sale—Punjab Pre-emption Act, 1905, sections 3 (5) and 4.

Held, that an arrangement by which the proprietors of certain land granted occupancy rights to certain tenants on payment of a very trifling sum (the object of the arrangement being to induce the tenants to effect certain improvements in the land) is not a sale as contemplated by the Punjab Pre-emption Act-1905, and cannot therefore be the subject of pre-emption.

[136 P R. 1907 (1) followed]

Further Appeal from the decree of E. A. Estcourt, Esquire, Divisional Judge, Attock Division, dated the 30th November 1909.

Badar-ud-Din and Muhammad Din, for appellants.

Nemo, for respondent.

The judgment of the Court was delivered by—

28th March 1911.

KENSINGTON, J.—This case is before us as an appeal under clause (b) of section 70 (1) of the Punjab Courts Act, and should have been entered on the register of appeals. The question of law involved is that stated in the second ground of revision, which alone is pressed, namely, whether under the circumstances of the transaction in dispute it should be held that there has been a sale giving rise to a right of pre-emption. The point is of some importance. The lower Courts have concurred in holding that the plaintiff pre-emptor should succeed, but neither of the judgments indicate clear understanding of the question involved, and considering the superficial manner in which the case has been dealt with, especially in the lower appellate Court, we think that there is ample ground for interference on revision.

The supposed sale of May 1908 was really an arrangement by which the proprietors of certain land granted occupancy rights to their tenants (defendants 4 to 10) on payment of a very trifling sum. The object of this arrangement clearly was that the tenants should effect certain improvements in the

land in consideration of which they were to be allowed fixity of tenure by way of occupancy right. The proprietors undertook to pay the revenue assessment on the land, while the tenants were to pay to them a moderate grain rent fixed at one-third *batai*. The plaintiff, a somewhat remote collateral of the proprietors, has chosen to regard the transaction in the light of a sale, and has brought a suit for pre-emption on his own account notwithstanding that his father was still alive. The lower Courts have for the most part directed their attention to minor incidents of the suit, though the really important issue in the case was No. 2, covering the question whether there could under these circumstances be a claim for pre-emption. The first Court disposed of this issue in favour of the plaintiff by a brief reference to the commentary at page 32 of Mr. Shadi Lal's Punjab Pre-emption Act, edition 1907. In the lower appellate Court the point seems to have been entirely overlooked. There is indeed a vague general reference to previous rulings, but it is understood that the Divisional Judge was referring to rulings dealing only with the question whether the Punjab Pre-emption Act permits a son to institute a suit independently of his father during the father's lifetime. He did not discuss the essential question going to the root of the case, though this was again plainly raised by the first ground of appeal. It is to be regretted that the lower appellate Court did not look into the matter more closely, and we are quite unable to understand why it has been assumed as a matter of course that this arrangement between the proprietors and the tenants should be open to attack by way of pre-emption.

The wording of the commentary by Mr. Shadi Lal at page 32 of his work, under sub-section 5 of section 3 of the Pre-emption Act, is to some extent misleading, in so far as it suggests that the Chief Court has decided by a series of rulings quoted that the creation of occupancy rights by a proprietor in favour of a person amounts to a sale for the purposes of the Act. A reference to these rulings—16 P. R. 1874 ⁽¹⁾, 196 P. R. 1882 ⁽²⁾, 120 P. R. 1883 ⁽³⁾, 179 P. R. 1888 ⁽⁴⁾, 43 P. R. 1892 ⁽⁵⁾--would have made it plain to the lower Courts that the Chief Court has never committed itself to so sweeping an assertion. In the first four cases quoted it has been laid down at the most that a special custom of pre-

⁽¹⁾ 16 P. R. 1874 (*Hans Raj v. Har Bakhsh*).

⁽²⁾ 196 P. R. 1882 (*Jahana v. Chowdri Jivan Khan*).

⁽³⁾ 120 P. R. 1883 (*Ghiba v. Hayat*).

⁽⁴⁾ 179 P. R. 1888 (*Rukna v. Kahn Singh*).

⁽⁵⁾ 43 P. R. 1892 (*Nihal Chand v. Rai Singh*).

emptive right might conceivably be established in cases of a kind, and we are not aware that as a matter of fact any such custom has ever been established. In the last case quoted—namely 43 P. R. of 1892 (1)—the right of pre-emption was conceded on a special ground not put forward in any of the previous cases, and not usually established by the terms under which proprietors grant occupancy rights to their tenants. The gist of these rulings has been more accurately described at page 88 of Mr. Shadi Lal's commentary under explanation (1) to section 12 of the Act, but in any case the commentary alone should not have been referred to without consulting the rulings upon which it professes to be based.

The general ground has been cleared since the Punjab Pre-emption Act came into force, as section 5 of that Act precludes enquiry into custom where agricultural land is concerned, while section 4 of the Act further expressly limits pre-emption to cases of sale. The initial question to be determined in cases of the kind is, therefore, whether the transaction is, or is not, a sale as contemplated by the Act. We may, in passing, note that it would be a distinct hardship to proprietors if such a transaction could be treated as a sale and therefore subject to a right of pre-emption. The proprietor may very well have reasons of his own for desiring to confer occupancy right upon particular tenants or others in whom he has confidence, and may not be willing to allow any one else to occupy the land upon similar terms. We do not say that mere hardship to either the proprietors or the tenants would be a proper ground for refusing pre-emption if the law was clear in favour of the pre-emptor, but it is certainly a ground requiring the lower Courts to look closely into the matter and for doing their best to ascertain what the law really is.

We do not ourselves see any reason for believing that the law on the point is open to serious doubt. Apart from the provisions of the Pre-emption Act, read as they stand, there is a clear pronouncement by their Lordships of the Privy Council at page 167 of the case *Abhiram Goswami and others v. Thyama Charan Nandi and others* (1), to the effect that an owner of land, who carves a subordinate interest out of his own property, thereby grants a lease only and does not annihilate his own interest. In other words he does not sell the property but leases it, and it is distinctly affirmed that in India a lease may be in perpetuity, such as is recognized in the Punjab by the grant

(1) 43 P. R. 1892 (*Nihal Chand v. Rai Singh*).

(2) L. R. 38 *Indian Appeals*, 148.

of occupancy rights. We take this authority as conclusive but we may also refer to the ruling in 136, *P. R.*, 1907 (1), in which the Chief Court arrived at a similar conclusion before the Privy Council ruling had been given in 1909. In No. 136 of 1907 (1), the whole of the rulings quoted by Mr. Shadi Lal have been discussed at considerable length, and a perfectly clear decision was arrived at, that no right of pre-emption can be set up in cases such as that before us. It ought not to have been necessary for us to again treat the matter as if it was still open to argument, but we have been obliged to do so owing to the way in which the lower Courts have in this suit disregarded all that was said by the learned Judges in 1907. We think it clear that the 1907 ruling was correct and should be followed. It was then pointed out that the creation of occupancy right pre-supposes the non-existence of any transferable right, prior to the date, on which the grant was made, and it was also pointed out how inequitable to the proprietor any other interpretation of the law would be. The basis of the ruling then given is now further supported by the decision of the Privy Council already referred to, and we trust that after the fresh explanation which we have given, the Courts of the Province will not again go wrong on the point through misunderstanding of passages in Mr. Shadi Lal's very useful commentary on the Punjab Pre-emption Act.

We find that the plaintiff has no right of pre-emption. The appeal is accordingly allowed. The decrees of the lower Courts are set aside and the plaintiff's suit is dismissed with costs throughout to the defendants.

Appeal accepted.

No. 38.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.
Mr. Justice Kensington.*

MUNICIPAL COMMITTEE, AMBALA—(DEFENDANTS)—
PETITIONERS,

Versus

MOHANDER SINGH AND ANOTHER—(PLAINTIFFS)—
RESPONDENTS.

Civil Revision No. 593 of 1910.

Custom duty—refund of—on goods being again exported—Appeal to Commissioner on refund being refused—suit for refund—Punjab Municipal Act, XX of 1891—rules by Local Government—rule VI.

The plaintiffs sued the defendants for compensation for refusal to refund Re. 1-2-9 custom duty, when the goods on which the tax had been paid were again exported by plaintiffs.

(1) 136 *P. R.*, 1907 (*Bhagwan Das v. Sidhu*).

Held, that under rule VI of the rules made by the Local Government under section 154 (j) of the Punjab Municipal Act, XIII of 1884 (which were maintained in force under section 2 (2) of the Punjab Municipal Act, XX of 1891) the plaintiffs had an appeal to the Commissioner from the order refusing the refund--and that the plaintiffs were bound to exhaust their remedy by appeal before filing this suit.

Held, consequently, that the present suit was barred by the plaintiffs' failure to appeal.

Petition under section 25 of Act IX of 1887, for revision of the order of Pandit Molak Ram, Munsif 2nd Class, with powers of Judge, Small Cause Court, Ambala, dated the 30th March 1909.

Fazal Hussain, for petitioners.

Duni Chand, for respondents.

The judgment of the Court was delivered by :—

25th March 1910.

SIR ARTHUR REID, C. J.—This application under section 25 of the Small Cause Courts Act can, in our opinion, be disposed of on the ground that the respondents were bound to exhaust their remedy by appeal before suing for refund of the customs duty in suit. The suit was for compensation for refusal to refund Rs. 1-2-9, customs duty, paid on certain goods. On the 1st May 1908, the Deputy Commissioner of the Ambala District, as President of the Municipal Committee, refused to refund the amount paid by the respondents on the ground that they had chosen to export the goods in question without verification by the Customs Superintendent.

Section 154 (j) of the Punjab Municipal Act, XIII of 1884, empowered the Local Government to make rules, consistent with the Act, as to the system under which refunds should be made on account of octroi, when the goods on which the tax had been paid were again exported.

On the 6th February 1889, the Lieutenant-Governor made certain rules under this part of section 154 (j) including :—
 “VI. An appeal against an order passed under these rules shall lie to the Deputy Commissioner unless he is a member of the Municipal Committee, in which case the appeal shall lie to the Commissioner or other officer empowered by the Local Government in this behalf, but every appeal must be preferred in writing within one month from the date of the order appealed against.”

Counsel for the respondents has not contended that any officer other than the Commissioner was empowered to hear such appeals.

Section 2 (2) of the Punjab Municipal Act now in force, XX of 1891, provides that all rules, regulations, bye-laws and orders made under the Act of 1884 shall, so far as may be, be deemed to have been made under the Act of 1891, and we see no reason to doubt that the rule above cited, published in the *Punjab Gazette* of the 14th February 1889, Part I—A, p. 32, was in force at the date of the payment of the customs duty and is still in force. The respondents, instead of appealing to the Commissioner, filed this suit more than six months after the date of the refusal of the President of the Municipal Committee, having given notice of suit on the 3rd of September, four months after the refusal.

In *Branson v. The Municipal Commissioners for the town of Madras* (1), Mottasami Ayyar, J. remarked at p. 390: "It may be that in some cases the remedy is inconvenient, but it is to be observed that where a statute creates a right and provides at the same time a remedy, that remedy and no other is available, and I doubt whether we have power to provide a different remedy because the former is an inconvenient remedy."

In *Ram Chandra v. The Secretary of State*, (2) at p. 108, authority is cited for the established principle "that, when by an Act of the Legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the Court is ousted, and in case of injury, the party cannot proceed by action." These authorities are directly in point, rule VI above cited, having the force of law. *Tuticorin Municipality v. South Indian Railway* (3), cited for the respondents does not help them, a distinction being drawn therein between a suit contesting the incidence of a tax lawfully imposed and a suit to recover on the ground that the so-called tax had no legal existence—money wrongfully levied. An appeal to the properly constituted authority had, moreover, been dismissed before suit. In the present case the alleged cause of action is the refusal to refund customs duty originally leviable and subsequently refundable—unlawful levy in the first instance is not alleged.

It is intolerable that a person whose remedy is by appeal should neglect that remedy and waste the time of the Courts by filing a petty suit, and the plea that the remedy by appeal

(1) (1879) *I. L. R.* 2 *Mad.* 362 *F. B.*

(2) (1889) *I. L. R.* 12 *Mad.* 105.

(3) (1889) *I. L. R.* 12 *Mad.* 78.

to the Commissioner, possibly then at Delhi, was onerous and inconvenient, has in our opinion, no force. Counsel for the respondents has not even attempted to shew that a memorandum of appeal could not have been submitted by post.

For these reasons we allow the application and dismiss the suit with costs here and below, on the ground stated at the commencement of this judgment, without considering the plea of limitation set up by the applicant.

Revision allowed.

No. 39.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon. Mr. Justice Kensington.

KHAN CHAND AND OTHERS—(PLAINTIFFS)—PETITIONERS,
Versus
GOLAB RAM AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Revision No. 1297 of 1910.

Bill of exchange—Hundi—payable so many days after date—presentation for acceptance and payment—Negotiable Instruments Act, XXVI of 1881, section 83.

Held, that the words "all previous parties" appearing in section 83 of the Negotiable Instruments Act, 1881, include the drawer.

Held also, that this section applies only to bills of exchange in which acceptance by the drawer is obligatory, i.e. a bill of exchange after sight, as defined in section 21 of the Act, and does not apply to the ordinary hundi of the country payable after a certain number of days, which comes under the class of bills requiring presentation for payment only and not for acceptance.

Petition under section 70 (1) (a) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the decree of Q. Q. Henriques, Esquire, Divisional Judge, Shahpur Division, dated the 4th October 1909.

Lal Chand, for petitioners.

Sukh Dial and Ganpat Rai, for respondents.

The order of the learned Judge, who referred the case to a Division Bench, was as follows :—

28th Feb. 1911.

KENSINGTON, J.—This is a revision under clause (a) of section 70 (1) of the Punjab Courts Act, but there appears to be no force in the defendants' plea that revision does not lie. The judgment of the lower Appellate Court dismissing the plaintiffs' suit solely on a technical construction of section 83 of the Negotiable Instruments Act, XXVI of 1881, constitutes a material irregularity whether that particular point has or has

not been rightly decided. The lower Appellate Court is clearly in error in thinking that this is the only question to be determined upon the evidence in the case.

The suit is brought upon four *hundis* drawn by defendants 1 to 3, as representatives of a firm Ram Chand-Jiwan Das, in July 1906, on an Amritsar firm. The *hundis* were in favour of plaintiffs and were payable after various periods of from 134 to 286 days. They were made over to plaintiffs, who sent them to another Amritsar firm, by which they were presented to the drawee on various dates as they became due. The drawee in each case took eleven days to consider whether he would honour the drafts and then dishonoured them on the ground that he had no assets belonging to the drawer. It is not clear whether the plaintiffs as holders then gave notice to the drawer, prior to institution of the present suit on the 18th October 1907.

Various defences were raised by the defendants, including one to the effect that the suit is bad in law because the drawee took more than twenty-four hours on presentment to consider whether he would honour the *hundis* or not. On this point issue No. 8 was framed, evidently with reference to clause 83 of the Negotiable Instruments Act. The Munsif found against the defendants on all the defences, and thereon decreed in plaintiffs' favour, but this particular issue No. 8 was briefly disposed of by saying that, "according to law it was not necessary to realise the consideration for the *hundis* within twenty-four hours, nor was it their (plaintiffs') duty to do so." In their appeal to the Divisional Judge the defendants *inter alia* raised this point again specifically. The learned Divisional Judge observed that the appeal raised four separate questions, but he discussed none of them except the legal objection based on section 83 of the Act. As to this he has found that section 83 clearly discharges the drawer from liability and he has in consequence accepted the appeal and dismissed plaintiffs' suit.

I must observe that the lower Appellate Court has dealt with the matter far too briefly. The question involved is one of difficulty and importance, and in dealing with a highly technical point arising out of the construction of an Act, with which Courts in the Punjab are not very familiar, there should at least have been some indication that the Judge consulted his works of reference. There is this much to be said for the lower Appellate Court, although no mention is made of it in the judgment, that there was on his record a copy of a judgment, dated the 27th May 1907, by a learned Judge of this Court, in Civil Appeal No. 83 of 1907, containing passages which go to support the Divisional Judge's finding. At the same

time the remarks made therein were clearly in the nature of an *obiter dictum*, the case then before the Chief Court being finally disposed of on another ground. Moreover, the lower Appellate Court, even if right in holding that section 83 of the Negotiable Instruments Act applies to a drawer, was clearly wrong in assuming that the plaintiffs' suit must therefore necessarily fail. Section 1 of the Act expressly provides that nothing therein contained affects any local usage relating to any instrument in an oriental language. There is evidence on the record, which should have been considered, showing that in Amritsar a local usage prevails giving the drawee of *hundis* a period of eleven days in which to decide whether he will pay or not. Whether this evidence establishes the local usage or not has still to be determined. I express no opinion on the point as it is a matter with which the lower Appellate Court must deal before dismissing plaintiffs' suit.

At the hearing of this revision I was of opinion that on this ground alone there should be a remand to the lower Appellate Court for re-hearing of the appeal, but on further consideration I think that the question of the proper construction of section 83 of the Negotiable Instruments Act, so far as the drawer is concerned, and the question whether the previous *dictum* of this Court already quoted is correct in law are matters of such importance not only to the plaintiffs in this particular case but also to the commercial community generally, that the point should be considered by a Division Bench. I accordingly refer the whole case to a Division Bench to determine what order should be passed in revision.

The point to be immediately determined before dealing with any other part of the case is whether the words "all previous parties" in section 83 of the Act include a drawer. My learned brother has held that they do, giving no authority for his conclusion beyond a reference to section 42 of the English Act of 1882. The Act is given as Appendix I to Bhashyam and Adiga's Commentary on the Negotiable Instruments Act, Edition 1909. The words "against the drawer and indorsers," no doubt appear in that section 42, but I do not understand the section quoted as having any immediate applicability, as it merely provides that the holder must treat a non-accepted bill as dishonoured. The section which should really have been quoted seems to me to have been clause 2 of section 40, and there also the words "drawer and all indorsers" no doubt occur, but the clause has to be read with

section 43. The argument of my learned brother may be correct, though he may have inadvertently referred to the wrong section. It is, however, permissible to express a doubt whether the full consequences of his pronouncement were realized, or whether if they had been, an *obiter dictum* so far-reaching in its results would have been given. I will make the matter clear by taking a very simple instance of a kind readily understood by all who have to deal with cheques, which are the simplest form of negotiable instruments known to the Act, and which equally with *hundis* come under the category of bills of exchange (see section 6 of the Act). A person A. draws a cheque in favour of B. on a bank. The cheque is presented by B. for payment by the bank, which either through pressure of business, or possibly through negligence on the part of some subordinate, neglects to dishonour the cheque with the usual formula (no assets—refer to drawer), within twenty-four hours after presentment. If I have correctly understood the *dictum* of my learned brother the result of this delay would, in his opinion, be that the holder of the cheque would lose all remedy against the drawer A. I cannot suppose that section 83 of the Negotiable Instruments Act was drawn with this intention, though it is possible that owing to defective drafting the section should be given this remarkable interpretation.

It does not, however, appear to me that there is any authority for interpreting the words "all previous parties" in section 83 as including a drawer. It will be observed that the English Act in the corresponding sections, 40 to 43, is less stringent as regards time than the Indian Act. It only uses the words "within a reasonable time," and does not provide any specific period within which the drawee must decide on acceptance or dishonour. It appears to me that as part of the distinction made in the Indian Act rigidly prescribing twenty-four hours, the words "drawer and all indorsers" used in the English Act have been designedly given up and the words "all previous parties" adopted. I am doubtful, whether even if we look to the terms of section 83 alone, these words "all previous parties" should be interpreted as including the drawer. I can only say that if they should be so interpreted there appears to be some conflict between section 83 and sections 30 and 93, which refer more particularly to the liabilities of a drawer. It would be for serious consideration, if section 83 of the Act is really so misleading on the question

of a drawer's release from liability, whether the matter should not be brought to the notice of the Legislature in order to remove a patent blot on the Act.

My own view, for what it is worth and as at present advised, is that the words used in section 83 ought not to be construed as covering the drawer as well as indorsers. I have been unable to trace any ruling directly bearing on the point, but a convenient summary of case law is given under section 93 at page 323 of the commentary already quoted. There are also two rulings of the Bombay High Court, to some extent in point. In *Nilkund Anantapa v. Munshi Apuraya* (1), it is held that presentation for acceptance within reasonable time is a condition precedent to a right of action on a bill or *hundi* payable after sight. From this it would appear that the High Court, giving judgment in 1886, did not consider the twenty-four hours' rule applicable in favour of a drawer, the words used being "within reasonable time." *Ram Ravji v. Pralhad Das* (2), deals with a case in which other points were concerned, but the exposition of the law about *hundis* given on pages 140 and 141 is of distinct assistance, and I take it that the High Court then also did not contemplate that a drawer could raise a plea such as has been allowed in the present case by application to him of the terms of section 83 of the Act. In *No. 19 P. R.*, 1888 (3), the point directly concerned was one of limitation, but the effect of sections 7, 64, 66 and 105 of the Negotiable Instruments Act was considered, and a sharp distinction was drawn between presentation for acceptance and presentation for payment, from which it would seem that the learned Judges recognised that the drawer's liability was not avoided by delay in acceptance only. In this connection *Phul Chand v. Ganga Ghulam* (4) has some bearing on the point, though that was a case dealing with a promissory note. The Full Bench ruling in *No. 57 P. R.* of 1900 (5), does not appear to me to be of much assistance.

I have indicated my present opinion more with the object of making the case clear than because of any very decided opinion about the proper construction of section 83, if read alone, apart from other sections of the Negotiable Instruments Act. It is difficult to believe that the Legislature can, when

(1) (1886) *I. L. R.* 10 *Bom.* 346.

(2) (1896) *I. L. R.* 20 *Bom.* 133.

(3) 19 *P. R.* 1888 (*Ram Chand v. Shadi Ram*).

(4) (1899) *I. L. R.* 21 *All.* 450.

(5) 57 *P. R.* 1900 *F. B.* (*Shivji Ram v. Hun Raj*).

framing the Act, have intended to give section 83 the very wide interpretation now placed on it. If that interpretation is correct the Act would seem to require amendment, and the matter is not one which can be properly dealt with by a single Judge. The conclusion that a dishonest drawer of every sort of bill of exchange has merely to arrange with the drawee that there shall be a trifling delay in acceptance on maturity of over twenty-four hours, in order to secure his own release from liability, can not be contemplated as a deliberate ruling of the Chief Court without serious misgivings as to its consequences in matters covering the daily practice of the whole commercial community.

The case is accordingly referred to a Division Bench.

The judgment of the Division Bench was delivered by :—

KENSINGTON J.—The circumstances of this case appear sufficiently from the order of reference to a Division Bench. Objection has again been raised before us on behalf of the defendants-respondents that no revision lies under clause (a) of section 70 (1), Punjab Courts Act. We overrule the objection, holding that the omissions from the judgment of the lower appellate Court constitute a material irregularity. 23rd March 1911.

No rulings bearing on the point under discussion have been traced other than those quoted in the order of reference. We are inclined to hold that the words "all previous parties," appearing in section 83 of the Negotiable Instruments Act, XXVI of 1881, should be construed as including the drawer. To this extent we agree with the previous single Bench ruling of this Court, dated the 27th May 1907, in Civil Appeal No. 83 of 1907. We are, however, quite clear that section 83 does not lay down any general ruling applicable to all bills of exchange, in the way in which the section has been interpreted by our learned brother. We take it as certain that the twenty-four hours' rule specified in the section cannot possibly have been intended by the Legislature to apply to bills of exchange generally, or in particular to *hundis* such as those in dispute in the 1907 case and in the case before us. We need not perhaps lay stress on the extreme case of cheques, suggested in the order of reference, inasmuch as cheques are specifically provided for by section 84 of the Act. At the same time, apart from the provisions of the Indian Stamp Act, there is no real distinction between a post-dated cheque and an ordinary *hundi* payable after a certain number of days. Both are essentially bills of exchange made payable

after a certain time, and if the twenty-four hours' rule applies to *hundis*, it is difficult to see how it could be held that it would not also be applicable to all bills of the same nature. When we look closely to the terms of section 83 we find that it applies only to bills of exchange in which acceptance by the drawee is obligatory. The only form of bill of exchange for which such acceptance is required by the Act is that described in the Act as a bill of exchange "after sight". These words "after sight" are defined and explained in section 21. The procedure on such bills is laid down in Chapter 5 of the Act dealing with presentment, under sections 61-63. It will be observed that section 63 prescribes the twenty-four hours' rule, and the only conclusion we can come to is that when the Negotiable Instruments Act was framed, section 83 was inadvertently placed in Chapter 7 instead of in what would seem to be its proper place, immediately after section 63. We have naturally some hesitation in putting forward an explanation of this nature, but when we read section 83 with many other sections of the Act, especially section 30, we think it impossible to come to any other conclusion. We are fortified in this conclusion by various passages in the Commentaries on the Negotiable Instruments Act by Chalmers, edition 1897, and of Bhashyam and Adiga, edition 1909, under sections 21, 30, 61, 63, 83 and 93 of the Act. The English Act, XLV and XLVI Vict. C. 61, specifies reasonable time in similar cases, and it may very well be that reasonable time is understood in England to mean twenty-four hours. We have, however, to bear in mind that bills of exchange after sight are more commonly used in England than in India, and it can not be safely assumed that the Legislature intended to apply the English practice to bills other than those of which acceptance is necessary. In this connection the discussion at page 54 of the ruling in 19 P. R. 1888 (1) is instructive, in so far as it draws a distinction between presentment for acceptance and presentment for payment. We do not desire to lay down any general rule regarding the practice of commercial bills in India, but we entertain no doubt that the ordinary *hundi* of the country comes under the class of bills which require presentation for payment only and not for acceptance. The previous single Bench decision of this Court, dated the 27th May 1907, is in our opinion erroneous, in so far as it applies section 83 of the Negotiable Instruments Act to *hundis* of the usual type payable after a certain number of days. We desire to make this quite clear as the ruling

(1) 19 P. R. 1888 (*Ram Ohand v. Shadi Ram.*)

in question is undoubtedly misleading as it stands, and has apparently caused the lower Appellate Court to go wrong in the present case. We observe that it was prominently referred to in No. 4- of the grounds of appeal to the lower Appellate Court.

The First Court distinctly found that the drawees had no money of the drawer with them, and on that account they refused payment on presentation of the *hundis* in suit. This finding was not specifically attacked in appeal by the defendants, and we understand that there is no doubt regarding its correctness. The plaintiffs, as holders of the *hundis* in suit, have shown sufficient diligence in suing the drawer, and it is quite clear that the *hundis* were presented for payment within a reasonable time. This disposes of nearly all the contentious matters in the suit, but we are unable to give a final decision as the lower Appellate Court has omitted to deal with Nos. 1 and 4 of the points enumerated in its orders of the 2nd August 1909 and the 4th October 1909, and we have had no argument before us to enable us to deal with these two points. We accordingly accept the revision and set aside the Divisional Judge's decree as having been given on an erroneous decision that the drawer is relieved of responsibility under the provisions of section 83 of the Act. We must remand the case to the lower Appellate Court for fresh decision of the appeal before it, with reference to the specified points 1 and 4, and to those only.

Court fee in this Court will be refunded to the plaintiffs-petitioners, and the remaining costs of revision will be costs of the cause,

Revision allowed.

No. 40.

Before Hon. Mr. Justice Kensington and Hon. Mr. Justice Rattigan.

NAWAB AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

TIKAYA RAM AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 875 of 1908.

Pre-emption—Sale completed by execution of decree for specific performance of contract—not subject to pre-emption—Punjab Pre-emption Act, II of 1905, sections 3 (5) and 4.

In 1900 one J. sold certain lands to defendants 2 and 6. One of the owners of the land happened to be a minor and J. his uncle, as his *de facto* guardian agreed that if at any time the minor repudiated the sale, he (J) would give the vendees a like amount of land out of his own property. Subsequently the minor did repudiate the sale and recovered his share from the vendees by suit. Thereon the vendees sued J. for the land which he had agreed to give them in lieu of the minor's share. This claim was strenuously contested by J. but the vendees obtained a decree. The present plaintiffs who were the sons of J. sued for pre-emption of the land decreed to the vendees.

Held that the vendees' suit against J. was in its essence one for specific performance of contract and the decree *per se* did not effect "a sale" of the land even though the price may have been previously paid. The sale (if it could be so called) was not completed until the decree holders executed the decree and so obtained possession of the land, and that it thus fell within the exception given section 3 (5) of the Punjab Pre-emption Act, as a sale in execution of a decree and consequently no right of pre-emption arose in respect of it.

Further appeal from the decree of M. L. Waring Esquire, Additional Divisional Judge, Shahpur Division, dated the 26th February 1908.

Nauak Chand and Miran Baksh, for appellants.

Ishwar Das, for respondents.

The judgment of the Court was delivered by—

17th Nov. 1910.

RATTIGAN J.—In 1900 one Jawaya sold certain lands to defendants 2 and 6 for Rs. 2,000 by registered deed of sale. One of the owners of the land happened to be a minor and Jawaya, his uncle, as his *de facto* guardian, purported to act on his behalf and agreed that if at any time the minor, Ahmad Khan, repudiated the sale, he (Jawaya) would give the vendees a like amount of land out of his own property. Ahmad Khan subsequently brought a suit against the vendees and recovered from them his share in the property, consisting of some 134 *kanals* of land. Thereafter, the vendees sued Jawaya for the land which he had agreed to give them in the event of Ahmad Khan repudiating the sale of his share, and obtained a decree for possession of the land for which they sued. This claim was strenuously contested by Jawaya both in the first Court and in the Divisional Judge's Court

Plaintiffs, who are the sons of Jawaya, now sue for pre-emption of the land decreed to the vendees. Admittedly they would have had no right to sue as pre-emptors in respect of the original sale in 1910, but by virtue of the Punjab Pre-emption Act, 1905, they claim to have the right of pre-emption in respect of the decree passed in favour of the vendees in 1907. The Divisional Judge has dismissed their claim on the ground

that the decree against Jawaya was one enforcing the performance of a contingent contract to sell and that it would "be an abuse of language to treat this as a sale" for the purposes of the law of pre-emption. Plaintiffs have preferred a further appeal to this Court, but after hearing their learned counsel, Mr. Nanak Chand, we see no reason to interfere with the decision of the learned Divisional Judge.

The vendees' suit in 1907 against Jawaya was in its essence one for specific performance of contract, and it was so regarded by the Divisional Judge who disposed of Jawaya's appeal to his Court. The effect, then, of the decree granted to the vendees was that they were entitled by due process of law (*i. e.* by execution of their decree) to obtain possession of the land awarded to them. Mr. Nanak Chand contends that this decree, read in the light of the prior agreement between Jawaya and the vendees, amounts to "a sale" of the land, and it is upon the basis of this argument that Jawaya, who has himself failed to keep his land from the vendees, has through his sons, now attempted to defeat the latter by this claim for pre-emption.

We cannot accede to the contention. The decree *per se*, did not effect "a sale" of the land, even though the price may have been previously paid. It merely gave the vendees the right to secure the land and the "sale" (if it can be so called) was not complete until the decree-holders executed the decree and so obtained possession of the land. Until the decree was executed it resembled a mere agreement to sell, inasmuch as it merely gave the decree-holders a right to complete the transaction. But the Act provides that "a sale" for the purposes of the law of pre-emption does not include a sale in execution of a decree, and we cannot limit this wide expression more to sales effected in execution of ordinary decrees. It seems to us that the words are as applicable to sales which are completed by the execution of decrees such as that in this case, and that it is only in the case of voluntary sales *inter partes* that the provisions of the Act can apply. In the present case the so-called "sale" was in no sense voluntary. Jawaya, as we have pointed out, did his utmost to resile from his bargain and he fought the case brought against him by the vendees to the bitter end. And even now it is clear that he is making a last desperate effort to defeat their claims.

In our opinion, the suit was rightly dismissed, and we accordingly reject this appeal with costs.

Appeal dismissed.

No. 41.

Before Hon. Mr. Justice Rattigan.

KASHI NATH—(PLAINTIFF)—PETITIONER,

Versus

NATHU RAM—(DEFENDANT)—RESPONDENT.

Civil Revision No. 1126 of 1910.

Decree or order—Order refusing to entertain a plea—Civil Procedure Code, Act V of 1908, section 2, clauses (2) and (14)—right of appeal—

The purchaser of the equity of re-demption sued the mortgagee for a perpetual injunction to restrain the latter from effecting certain repairs. One of the pleas of the defendant was that he held a mortgage from a co-owner in the mortgaged property, from whom he had a separate mortgage empowering him to effect the repairs. The District Judge held that he was in law debarred from going into the question of the rights of a co-owner, and refused to go into them. The defendant thereon preferred an appeal to the Divisional Judge from the order of the District Judge on this point. The Divisional Judge held that the order amounted to a preliminary decree and was consequently appealable.

Held, that the order of the District Judge was not a preliminary decree but merely an order as defined in section 2 (14) of the Code of Civil Procedure and that no appeal lay therefrom to the Divisional Judge.

Petition under section 70 (a) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of Major A. A. Irvine, Divisional Judge, Lahore, dated the 25th February 1910.

Sheo Narain, for petitioner.

Sukh Dial, for respondent.

The judgment of the learned Judge was as follows :—

9th March 1911.

RATTIGAN J.—Briefly stated, the facts of this case, so far as they are material for present purposes, appear to be that on the 21st August 1905, one Bausi Dhar mortgaged a shop and *baithak* to the defendant with possession.

Plaintiff alleges that this property was subsequently sold to him and that he now stands in the shoes of the original mortgagor. He accordingly sued as such for redemption of the property and for an injunction to restrain defendant from effecting certain repairs to the property. His suit for redemption was found by the District Judge to be premature and he accordingly amended his claim and confined his prayer to one for the perpetual injunction in question.

Defendant admits the mortgage by Bausi Dhar, and as this Court has in a previous order found and held that he cannot under the terms of that mortgage effect certain repairs, he has now pleaded that subsequently to his taking the mortgage

from Bansī Dhar, he discovered that one Mussammat Suraj Devi was a co-owner in the property, and that he has obtained a mortgage from that lady under the terms of which he is empowered to effect repairs, which he might not have the right to effect if he held merely under the mortgage by Bansī Dhar.

The District Judge, by his order dated the 8th December 1909, has disallowed this plea on the ground that the 2nd part of section 116 of the Indian Evidence Act estops defendant from denying that Bansī Dhar (the original mortgagor) had a title to the *whole* of the house mortgaged by him to defendant. The District Judge concludes this order with the words: "This disposes of the question of Mussammat Suraj Devi's rights as far as this case is concerned, and I refuse to go into them or to ascertain them in this case." Having passed this order, the District Judge, proceeded to frame issues in the case. The defendant, however, preferred an appeal to the Divisional Judge from the District Judge's order refusing to entertain his plea, and objection was at once taken on behalf of plaintiff that no appeal could lie from an interlocutory order of the kind. The reply was that the order amounted to "a preliminary decree" within the meaning of section 2 (2) of the Civil Procedure Code, and that defendant was bound to appeal at once from it, in view of the stringent provisions of section 97 of the Code.

The learned Divisional Judge held that the order under appeal finally decided (so far as the District Judge's Court was concerned) a portion of the controversy between the parties and, therefore, amounted to a preliminary decree from which an appeal would lie to his Court. He thereupon proceeded to deal with the appeal upon its merits, and held that defendant was not estopped from preferring the plea which had been disallowed by the District Judge. His reasons for so holding may be given in his words:—

"The appellant (*i. e.* defendant) is not denying his original mortgagor's title or asking to have the original mortgage set aside, on the contrary, he asserts it to be valid, and asserts that Mussammat Suraj Devi's mortgage is a further mortgage. It is argued that appellant has raised this question as subsequent mortgagee from Suraj Devi, that he stands in her shoes, and that he is entitled to raise a question regarding her rights which she could raise herself." The

learned Judge then held that section 116 of the Evidence Act was no bar to the reception of defendant's plea and that in view of this Court's opinion expressed in a former stage of the proceedings, the plea should be admitted. He accordingly accepted defendant's appeal and remanded the case to the District Judge with the direction that the rights of Mussammat Suraj Devi in the property should be gone into and ascertained.

Plaintiff has now applied for revision of the learned Divisional Judge's order on the grounds :—(1) that no appeal could lie to his Court as the order of the District Judge was not a preliminary decree ; (2) that the Divisional Judge had not correctly understood the points in controversy between the parties ; and (3) that the defendant as the mortgagor from Bansi Dhar was estopped from asserting the rights in the property which are alleged to have belonged to Mussammat Suraj Devi.

In support of his 1st ground, Mr. Sheo Narain contends that the order of the District Judge was not a preliminary decree within the meaning of section 2 (2) of the Civil Procedure Code, because *firstly*, it was not embodied in the form of a decree ; and *secondly*, it did not adjudicate upon the matter in question, but merely declined to consider it. The learned pleader's argument, in other words, is that it is necessary that every order which is to be treated as a decree (whether such decree be preliminary or final) should be drawn up in formal terms as a decree, and that in any event an order which refuses to entertain a plea cannot be regarded as a decree, whether preliminary or final, because so far from adjudicating upon the point involved in the plea, the order declines to determine it. In the present case there was, according to Mr. Sheo Narain, merely a failure to exercise jurisdiction and in respect of such failure no appeal could lie to the Divisional Judge. In support of his first contention, Mr. Sheo Narain refers to *Bai Divali v. Vishnar* (1). In that case the subordinate Judge in an administration suit decided in effect a substantial question of right between the parties, and having so decided, appointed receivers of all the property in question in the suit. The High Court of Bombay held that a decree was something different from a judgment and that as the decision of the Subordinate Judge upon the issue between the parties had not been drawn up in the form of a decree, no appeal would lie therefrom. An

(1) (1939) 11 Bom. L. R. 1329.

administration suit is admittedly one of the class of suits in which "preliminary decrees" are necessary and in which the decision of the Court upon preliminary matters might be regarded *par excellence*, as a "decree". This authority is, therefore, in point and lends considerable support to Mr. Sheo Narain's argument (see also as to this, *Khadem Hossein v. Emdad Hossein* (1): at page 760). His second contention does not appear to me to have the same force. In one sense, of course, the District Judge refused to adjudicate upon the plea, but in a more real sense he did adjudicate upon it by holding that the defendant was estopped from putting it forward. In so deciding, he thereby held that the defendant who had accepted a mortgage of the whole of the property from plaintiff's predecessor in title, was thereby precluded by law from setting up, as against the mortgagor, certain rights in respect of that property which, he alleged had been granted to him by Mussammatt Suraj Devi. I cannot agree with the argument that this was not an adjudication as to the matter in controversy between the parties. But it obviously does not follow as a necessary consequence, that the order of the District Judge amounted to a "preliminary decree" within the meaning and for the purposes of section 2 (2) of the Civil Procedure Code.

I am free to admit that the terminology of this section is far from clear and that the words used by the Legislature are wide and (if I may respectfully say so) rather vague. But I do not think that the definition of "decree" was intended to include an interlocutory decision in ordinary suits, upon each and every point in controversy between the parties, even in those cases where the decision upon any such question is embodied in a separate and distinct order passed during the pendency of the proceedings. I cannot, for example, think that a preliminary order passed by the Court to the effect that a certain claim was within time or that a plea of *res judicata* or of misjoinder was or was not entertainable, must necessarily be regarded as a "preliminary decree". It would be difficult to draw the demarcating line in such cases. For instance, if a certain document is tendered in evidence and the Court holds, by separate order, duly recorded that such document is or is not admissible in evidence, I cannot think that the Legislature intended that such order should be treated as a "preliminary decree", though it may have been formally

(1) (1902) I. L. R. 29 Cal. 758 F. B.

passed and in one sense conclusively determines the rights of the parties with regard to a matter in controversy in the suit. In every such case the order would in my opinion fall more naturally and reasonably under the definition of "order" as given in section 2 (14) of the Code.

In my opinion a "preliminary decree" properly understood is passed only in those cases in which the Court has first to adjudicate upon the rights of the parties and has then to stay its hand for the time being until it is in a position to pass a final decree in the suit. This happens in suits for administration, for partition of property, for dissolution of partnership, for foreclosure for sale of mortgage-property, and by a principal for accounts from his agents. (See order 20, rules 13, 15, 16, 18 (2) and Order 34, rule 4). Under the provisions of the Code of 1882 there was considerable doubt upon these points and it was a more or less open question whether (*e. g.*) in a suit for partition an order declaring the specific rights of the parties and the property to be partitioned but leaving it open to the parties to declare whether they desired that a complete partition by metes and bounds should be made, was or was not a "decree" as defined by that Code (See *Dulkin Gulab Koer v. Radhu Dulari* ⁽¹⁾ overruling *Moyi Dabea v. Shurat Sundery* ⁽²⁾). It was, I think, with a view to settle the law in such cases that the definition of "decree" was amended in the present Code; but I do not think that the intention was to convert practically all interlocutory orders into "preliminary decrees."

In the case before me, I have come to the conclusion, though not without hesitation, that the order of the District Judge was not a preliminary decree, but merely an order as defined in section 2 (14) of the Code, and that no appeal lay therefrom to the Divisional Judge. It is true that the order was recorded separately and formally, but that fact alone would not take it out of the purview of the latter sub-section, as an "order" is itself defined as being "the formal expression of any decision of a Civil Court which is not a decree." I think moreover that there is force in Mr. Sheo Narain's objection that an order cannot be regarded as a decree, unless it is formally drawn up as such, or at all events unless it could be so drawn up. It may be that the failure on the part of a Court to formally embody an order passed by it in the form of a decree, would not materially affect the question,

(1) (1892) *I. L. R.* 19 *Cal.* 463 *F. B.*

(2) (1885) *I. L. R.* 12 *Cal.* 275.

but I think I am on safe ground in holding that no order can reasonably be treated as a decree, preliminary or otherwise, which could not in the ordinary way be embodied in the form of a decree.

In support of my views. I may refer to the forms of "preliminary decrees" given in Appendix D, to the Code, Nos. 3, 4, 5, 17, 19, 21. In the present case I cannot see how the order of the District Judge, now under consideration, could possibly have been embodied in the form of a "decree" such as is known to law.

I hold therefore that the order passed by the District Judge on the 8th December 1909 was not a decree and that no appeal lay therefrom to the Divisional Judge. As a result of this decision, I find that the Divisional Judge had no jurisdiction to entertain the appeal presented to him and I set aside his order. The District Judge will now proceed with the hearing of the case as if no such order had been passed. The respondent must pay the costs of all proceedings in the Divisional Judge's Court and in this Court.

Revision allowed.

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No. 42.

Before Hon. Mr. Justice Shah Din.

GURBACHNA AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

BUJHA AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 323 of 1910.

Custom—Adoption—how manifested—registered deed of adoption—subsequent treatment—proof of.

Held, that in a case where the power of customary adoption by a sonless proprietor is not disputed, all that is necessary to constitute an adoption is the clear expression of an intention on the part of the adoptive father to adopt the boy concerned as his son, and a sufficient manifestation of that intention by the execution and registration of a deed of adoption coupled with a clear declaration in Court and subsequent treatment as adopted son.

Proof of such subsequent treatment cannot, however be reasonably demanded in a case where very soon after the execution of the deed of adoption, the reversioners of the adoptive father sue for a declaration that the adoption did not in fact take place, and where therefore the adoptive father cannot *ex necessitate rei* prove continuous subsequent treatment.

Further appeal from the decrees of M. L. Waring, Esquire, Divisional Judge, Jullundur, dated the 17th February 1910.

Sheo Narain, for appellants.

Gokal Chand, for respondents.

The judgment of the learned Judge was as follows:—

8th March 1910.

SHAH DIN, J.—This appeal has arisen out of a suit brought by the plaintiffs for a declaration that the registered deed of adoption, dated the 20th March 1909, executed by Mahtab, defendant No. 1, in favour of Gurbachna, defendant No. 2, shall not affect their rights of inheritance in respect of Mahtab's property after his death. The suit was brought on the 6th May 1909, *i.e.*, about a month and a half after the deed of adoption was executed. The first court has held that the execution and registration of the deed of adoption, in which Mahtab declares in unequivocal terms that he has adopted Gurbachna as a son, coupled with his clear statement in court in support of the recitals in the aforesaid deed, is sufficient, in the peculiar circumstances of the case, to constitute Gurbachna the adopted son of Mahtab. The Divisional Judge, on the other hand, was of opinion that the mere execution of the deed of adoption, unaccompanied by previous or subsequent treatment of Gurbachna by Mahtab as his son, did not constitute an adoption under customary law.

The question for decision before me is which of these two conflicting views is the correct one and I have no hesitation in holding that the view taken by the Divisional Judge is erroneous. There is no question in this case at all as to the validity or otherwise of the adoption, as it seems to have been admitted that by custom Mahtab had full power to adopt Gurbachna as his son, the sole point in respect of which the parties are at issue being whether the boy has as a matter of fact been adopted by Mahtab. The Divisional Judge is clearly wrong in holding, by reference to No. 40 *P. R.* 1905, (1) that in a case of this kind, apart from the execution of a deed of adoption by the adoptive father, *previous* treatment of the boy as adopted son is necessary. The relevant passage in the above judgment at pages 145—146 runs as follows:—

“ Even if this early adoption be treated as not proved, we
“ hold that the execution of the deed, coupled with the adopter's
“ clear statement in court and continuous subsequent treatment
“ is sufficient to constitute Budh Singh the adopted son or
“ appointed heir of Nihal Singh.....The only question then
“ appears to be whether the adoptive father has expressed his in-
“ tention in an unequivocal manner.”

(1) 40 *P. R.* 1905 (*Budh Singh v. Mula Singh*).

After discussing some of the published decisions of this court bearing on the point, the learned Judges go on to say at page 146, paragraph 3:—

“Following the principles laid down by these authorities “we hold that the execution and registration of the deed, “coupled with Nihal Singh’s declaration in court, were quite “sufficient to show that Budh Singh was adopted by him.”

One of the decisions cited with approval in that case is No. 4 P. R. 1892 (1), in which there was an adoption by deed without the observance of any ceremonies, and in which there was no previous treatment as adopted son, but only subsequent treatment after the deed up to the death of the adopter, which took place soon after the execution of the deed.

The present case is stronger than No. 4 P. R. 1892 (1), as here the plaintiffs have rushed into court with a suit for a declaration within two months of the execution of the deed of adoption by Mahtab, and have not allowed him sufficient time to act up to his clear statement that he has adopted Gurbachna as his son. Mahtab has appeared before me with Gurbachna, and though an old man, he is yet in vigorous health, and is likely to live some years longer. He is emphatic in his declaration that he has adopted Gurbachna and is treating him as his son; and that being so, the mere fact that *previous* to the execution of the deed of adoption he did not treat this boy as a son is manifestly insufficient to show that he did not in good faith intend to adopt him and to appoint him as his heir. Such previous treatment is not laid down as a *sine qua non* in No. 40 P. R. 1905 (2); what is necessary is the clear expression of an intention on the part of the adoptive father to adopt the boy concerned as his son, and that intention is sufficiently manifested by the execution and registration of the deed of adoption coupled with a clear declaration in court and subsequent treatment as adopted son. If in this case sufficient time has not elapsed since the execution of the deed of adoption to enable Mahtab to establish such subsequent treatment, it is the plaintiffs themselves who are to blame and not the adoptive father. By rushing into court with a suit for a declaration almost immediately after the execution of the deed in question they have deprived Mahtab of a reasonable opportunity of proving continuous subsequent treatment of Gurbachna as his son for a sufficiently long period, and they cannot expect the court to grant them a

(1) 4 P. R. 1892 (*Jeram v. Manphul*).

(2) 40 P. R. 1905 (*Budh Singh v. Mula Singh*).

declaration simply and solely because such subsequent treatment has not taken place.

I therefore accept this appeal and reversing the decree of the Lower Appellate Court, restore that of the first Court with costs throughout.

Appeal accepted.

No. 43.

Before Hon. Mr. Justice Johnstone.

HARNAM SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

MUSSAMMAT HARDEVI--(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1165 of 1910.

Custom—Alienation—Succession—Daughters—Hindu Law—Sodhi Khattries, Mauza Bhamipura, Tahsil Jagraon, District Ludhiana.

Held, that the initial presumption in the case of Khattries and especially of Sodhis is that they follow Hindu Law.

Held also, that it had not been proved that Sodhi Khattries of Mauza Bhamipura, Tahsil Jagraon, District Ludhiana, follow agricultural custom in connection with alienation of, or succession to, ancestral immoveable property and by Hindu Law collaterals in the 4th degree do not exclude daughters.

Appeal from the decrees of T. P. Ellis, Esquire, Additional Divisional Judge, Amballa Division, dated the 18th July 1910.

Lajpat Rai, for appellants.

Lal Chand and Sohan Lal, for respondents

The judgment of the learned Judge was as follows :—

8th May 1911.

JOHNSTONE, J.—These three appeals (Nos. 1165 to 1167 of 1910) all turn upon the same point. They have been tried together below and have been argued together before me, and a single judgment will suffice to dispose of them all.

The three suits were brought by the same plaintiffs, who are reversioners in the 4th degree of the last male holder of the lands involved, for declarations that certain alienations made by defendants, widows, should have no effect against plaintiffs' rights after the ladies' deaths.

The first Court found—

(a) That the lands are not proved ancestral ;

(b) That the parties follow their personal (Hindu) law, under which daughters are not excluded by collaterals like plaintiffs ;

and so that Court dismissed plaintiff's suits, but without costs.

On appeal the learned Divisional Judge (Mr. Mul Raj) held, that the *onus* of proving that the parties follow Hindu Law lay on defendants, and that the *onus* had not been discharged. He thereupon accepted the appeals and remanded the cases under order 41, rule 23, Civil Procedure Code, to the first court for retrial.

Appeal to this Court (Civil appeal 793 of 1909) resulted in the setting aside of these orders, the suits not having been decided on a preliminary point and the remand of appeals to the Divisional Court for decision according to law; and in the end the new Divisional Judge (Mr. Ellis) in an exhaustive and able judgment, dated 18th July 1910, dismissed the appeals, finding, as the First Court did, that the property is not ancestral, and going on to rule that the presumption on the precedents and authorities is against Sodhi Khattris following agricultural custom and that this presumption has not been rebutted.

The defendants coming on here on the revision side have succeeded in having their petitions admitted as further appeals under section 70 (1) (b), Punjab Courts Act, upon the question of custom. The question of the ancestral nature of the land is disposed of and cannot be touched upon here. I have heard arguments on the question of custom *versus* Hindu Law, and my opinion is much the same as that of the learned Divisional Judge, Mr. Ellis.

The way I look at the case is this. The initial presumption in the case of Khattris, and especially of Sodhis, is that they follow Hindu Law*. They are not essentially agriculturists, and they have, as a rule and as a tribe, a priestly status. ^{* 1 P. R. 1910 (Brahmin case)(1).} The presumption has to be met by the plaintiffs with proof of a special custom, or of special incidents and circumstances calculated, according to the authorities to shift the burden of proof. Mr. Lajpat Rai, speaking for the plaintiffs, instances the following special circumstances, namely—

- (i) Family established in the village since 1823.
- (ii) Means of subsistence, agriculture.
- (iii) Not shewn that these Sodhis exercise priestly functions.
- (iv) *Janeo* abandoned.
- (v) Marriage by *Karewa* and *Anand* practised.

(1) 1 P. R 1910 (*Musst. Maya v. Gurdit Singh*),

(vi) Apart from these 3 alienations there was another among Sodhis of a similar kind in connection with which, it is asserted, that there was a law suit (Chief Court Civil appeal 60 of 1902), in which the result was practically in favour of the reversioners and against daughters.

At first sight all this looks serious for defendants, but the above contentions are liable to large discounts. In cases in which it has been presumed that persons, not essentially agriculturists by race, follow agricultural custom, much stress has always been laid upon the question whether they form a compact village community, or at least a compact and considerable body of landowners in a more or less homogeneous village *cf.* Civil appeal 997 of 1906, quoted in 79 *P. R.* 1909 (1). If they do, and if they have been agriculturists for generations, the presumption aforesaid is generally made; but here, though these Sodhis have held land in the village for nearly 90 years, they did not come in with the founders, they are only *kabza maliks*, they number only 5 families, holding 100 acres of land out of a village area of 3,000 acres. Then there is no positive evidence one way or the other, whether they live solely by agriculture; one would imagine it would be difficult for 5 families to live on the profits of so small an area as that stated above. As to abandonment of *janeo* and no actual exercise of priestly functions, see the analogous case 58 *P. R.* 1906, (2) dealing with Brahmans who had become Sikhs. I do not think much can be inferred from the adoption of irregular marriage customs, and, after considering the facts and results of Civil appeal 61 of 1902 aforesaid, which was compromised in a manner very unfavourable to the reversioners, I cannot see that it helps plaintiffs.

Of the rulings quoted by counsel the following relate to Sodhi Khatris—

84 *P. R.* 1898 *F. B.* (3) (*Tahsil Zira*, District Ferozepore), 50 *P. R.* 1895 (4) (*Tahsil Muktsar*, District Ferozepore), Civil appeal 2647 of 1884 (District Ferozepore), 79 *P. R.* 1909 (1) (*Tahsil Batala*, District Gurdaspur). In 84 *P. R.* 1898 (3), a Full Bench case, it was assumed for the purposes of the reference that the parties followed custom; the ruling is of no use to us here. In 50 *P. R.* 1895 (4) it was found upon instances

(1) 79 *P. R.* 1909 (*Sardar Singh v. Maharaj Das*).

(2) 58 *P. R.* 1906 (*Gopal Singh v. Sukha Singh*).

(3) 84 *P. R.* 1898 *F. B.* (*Harvans Singh v. Harnam Singh*).

(4) 50 *P. R.* 1895 (*Sodhi Kartar Singh v. Sher Singh*).

and the opinions of aged and respectable persons that reversioners could control alienations. I cannot see how this case helps the plaintiffs, as it was decided on its own special facts. The unpublished judgment seems to me to have no bearing on the case before me; and 79 *P. R.* 1909 ⁽¹⁾ is all in favour of defendant. In that case I explained what was in my opinion the proper way of looking at these cases.

There are some Bedi Khattri cases that are worth looking at in this connection—*e. g.*, 122 *P. R.* 1893 ⁽²⁾, 33 *P. R.* 1907 ⁽³⁾, and 21 *P. R.* 1896 ⁽⁴⁾, all from Hoshiarpur. In 33 *P. R.* 1907 ⁽³⁾ one test in questions like the present was stated to be the adoption of agriculture as a means of livelihood for several generations; that is to say, the absence of this incident was held to be fatal to the plea that custom was followed. But it must not be supposed that in all cases the existence of this incident is sufficient in itself to prove the opposite.

Considering all these authorities and the facts of the present case, and the entire absence of positive proof of the adoption of agricultural custom by this family, I have no hesitation in agreeing with the learned Divisional Judge that these Sodhis of *mauza* Bhamipura, *tahsil* Jagraon, district Ludhiana, do not follow agricultural custom in connection with alienations of, or succession to, ancestral immoveable property but follow Hindu Law, and that collaterals in the 4th degree do not exclude daughters.

I dismiss all three appeals with costs.

Appeal dismissed.

No. 44.

Before Hon. Sir Arthur Reid, Kt. Chief Judge, and Hon. Mr. Justice Johnstone.

NATHU AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

RAHMAN AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 37 of 1909.

Custom—Adoption—Muhammadan Jats, Garhshankar tahsil, Hoshiarpur district—Adoption of daughter's son—presumption against its validity—Riwaj-i-am—consent of nearest collateral—Limitation in suit for possession—Indian Limitation Acts of 1877 and 1908, Schedule II, articles 118 and 144.

⁽¹⁾ 79 *P. R.* 1909 (*Sardar Singh v. Maharaj Das*).

⁽²⁾ 122 *P. R.* 1893 (*Khazan Singh v. Maddi*).

⁽³⁾ 33 *P. R.* 1907 (*Nihal Chand v. Bhagwan Singh*).

⁽⁴⁾ 21 *P. R.* 1896 (*Uttam Singh v. Jhanda Singh*).

Held, following the interpretation in 96 P. R. 1908 (1) of the Privy Council Ruling reported in *Tirbhuvan v. Rameshar* (2), that a suit for possession, where an adoption is set up in defence, is governed by article 144 and not article 118 of the Limitation Acts of 1877 and 1908 and that the Full Bench Ruling in 86 P. R. 1905 (3) must be held to have been overruled by the Privy Council.

Held also, following 50 P. R. 1893 F. B. (4) that the general presumption among Jats of the Garhshankar *tahsil*, Hoshiarpur district, is that the adoption of a daughter's son is invalid, and that no special custom in favour of its validity had been proved, the mere entry in the *Riwaj-i-am* unsupported by instances being insufficient for the purpose.

Held further, that the consent of the brother of the adoptive father (a sonless man) did not bind the more distant collaterals, the plaintiffs.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Delhi Division, dated the 7th February 1937.

Shadi Lal, for appellants.

Oertel and Sham Lal, for respondents.

The judgment of the Court was delivered by—

5th May 1911.

JOHNSTONE, J.—Certain agnatic relations of one Chela deceased, being related to him in the 8th and more distant degrees, have sued defendant, Rahman, and 13 *pro formâ* defendants for his landed property. Defendants resisted the claim on grounds of *locus standi* of plaintiffs, time-bar, acquiescence, and an alleged adoption of himself as a daughter's son by the said Chela.

The first Court held that the suit was time-barred under article 118, schedule II, Limitation Act, 1877. That Mehra, brother of Chela, and certain plaintiffs acquiesced in the mutation in favour of defendant 1 in 1896; that plaintiffs are certainly reversioners of Chela and that the alleged adoption took place and is valid because consented to by Mehra. The lower appellate Court agreed that the suit is barred by time and by Mehra's acquiescence, but also held that the adoption was invalid inasmuch as the presumption against the validity of such adoptions established by 50 P. R. 1893 F. B. (1) had not been rebutted.

As regards limitation the question in the abstract is not an easy one, but we think we must follow the interpretation in 96 P. R. 1908 (1) of the P. C. Ruling in *Tirbhawan v. Rameshar* (2) and hold that not article 118, but article 144 of the

(1) 93 P. R. 1908 (*Surjan Singh v. Kharak Singh*).

(2) (1906) I. L. R. 28 All. 727.

(3) 86 P. R. 1905 F. B. (*Karam Dad v. Nathu*).

(4) 50 P. R. 1893 F. B. (*Ralla v. Budha*).

limitation schedule is applicable. The important part of the P. C. Ruling for our purposes is the last 3 paragraphs on p. 739 to understand which fully it is necessary to bear in mind the wording of article 129, schedule II, Limitation Act, 1871, and article 118 of the similar schedule of the Act of 1877, respectively :—

	Description of suit.	Period of Limitation.	Time when period begins to run.
129 (IX of 1871).	To establish or set aside an adoption.	Twelve years	The date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father.
118 (XV of 1877).	To obtain a declaration that an alleged adoption is invalid or never in fact took place.	Six years ...	When the alleged adoption becomes known to the plaintiff.

Before the P. C. the defendant, who relied upon an adoption of himself and pleaded limitation, took his stand upon the Act of 1871, admitting that he had no case for limitation if Act XV of 1877 applied. Mr. Oertel strangely contends that the P. C. upon this went on to hold that even if the suit is one for possession by a reversioner and it is met by a plea of an apparent adoption, the limitation for the suit will be that applicable to suits to "set aside" or award adoptions. We are unable to see how the last two paragraphs of p. 739 can be read in this way. Their lordships evidently intended to lay it down that in such a case the lapse of 12 years (see article 129 in the Act of 1891) did not give *title* to the adopted person, which is tantamount to saying that the limitation for such a suit is not the limitation for a suit to set aside or avoid an adoption but that for a suit for possession of immoveable property. The words "on this short ground" which occurs in the last paragraph of the same page refer, we may point out, to the ground taken in the previous paragraph the remaining words of the last paragraph meaning "regardless of whether the alleged adoption, &c."

Generally speaking, this was the view taken by the Judges of the Madras H. C. in *Velaga Maugamma v. Bandla Mudi* ⁽¹⁾ and see also *Karnam Rama v. Venkaba* ⁽²⁾, and a similar ex-

⁽¹⁾ (1907) I. L. R. 30 Mad. 308.

⁽²⁾ (1907) 17 Mad. Law J. 282.

position of the law was given in 96 P. R. 1908 ⁽¹⁾, above cited. Mr Oertel contends further that this Court is bound by 86 P. R. 1905 F. B. ⁽²⁾ and 56 P. R. 1903 F. B. ⁽³⁾ at pp. 244, 246, 247 and *Jagadamba's* case ⁽⁴⁾, none of which, he says, were over-ruled by *Tirbhuwan v. Rameshar* ⁽⁵⁾ aforesaid. A few explanatory remarks upon those rulings will show that this contention is futile.

In 56 P. R. 1903 F. B. ⁽³⁾, at p. 244 it is said that since the publication of *Malkarjun v. Narhari* ⁽⁶⁾, this Court has held that where an alienation has not been set aside within the time allowed by article 91, schedule II, Limitation Act, 1877, a later suit for possession is barred. The case under consideration was one not of adoption but of alienation and all that the ruling comes to is that, while the *Jagadamba* case must be held to settle the law as regards adoption cases it does not follow that it settles the law as to other kinds of cases. Thus the P. C. ruling in 28 All. clearly operates to over-rule this expression of opinion as to the effect of the *Jagadamba* case in cases of adoption.

Jagadamba's case was one under the Act of 1871. The words in that Act are "to set aside an adoption, and it was held that the rule of limitation given by that article, applied to all suits in which the suitor could not succeed without displacing an apparent adoption in virtue of which the opposite party was in possession. It is clear that the P. C. has in the Allahabad case ruled that under Act XV of 1877, which is identical in its article 118 with Act V of 1908, the limitation in suits for possession is not that contained in that article.

The Full Bench case 86 P. R. of 1905 ⁽²⁾ is of an earlier date than the P. C. Ruling in 28 All. In it a distinction was drawn between cases in which the adoption is done with authority but by way of improper exercise of that authority and cases in which the adopter has "no inherent power to adopt." It was ruled that article 118 would apply in the former class of cases but not in the latter. If we are right in our interpretation of the Allahabad case, then clearly the Full Bench *dictum* is over-ruled and cannot now be followed by us.

⁽¹⁾ 96 P. R. 1908 (*Surjan Singh v. Kharak Singh*).

⁽²⁾ 86 P. R. 1905 F. B. (*Karam Dad v. Nathu*).

⁽³⁾ 56 P. R. 1903 F. B. (*Dheru v. Sidhu*).

⁽⁴⁾ (1886) I. L. R. 13 Cal. 308 P. C.

⁽⁵⁾ (1908) I. L. R. 28 All. 727.

⁽⁶⁾ (1901) I. L. R. 25 Bom. 337 P. C.

We therefore find that Mr. Oertel's contention is untenable and following the pronouncement of the P. C. we hold that the suit, having been filed within 12 years of the commencement of the adverse possession of defendant I, is under article 144 of the Limitation Schedule, within time.

The next point is whether the suit is barred by the acquiescence of Mehra or of the plaintiffs themselves. Mehra was a soulless man, and we think no argument is necessary to shew that his acquiescence in his brother's act does not bind plaintiffs. The parties are Muhammadan Jats and so are subject to Punjab agricultural custom, and according to that custom, as has been repeatedly held, acquiescence and consent by a brother like Mehra does not bind the next reversioners. Further there is no proof of acquiescence or consent by the plaintiffs except certain unsatisfactory oral evidence. We over-rule the learned Divisional Judge here and find for the plaintiffs.

But the Divisional Judge has also held that the adoption is invalid and this finding Mr. Oertel contests. He admits that 50 P. R. 1893 F. B. (1) is against him, but he points to the following rulings, namely, 79 P. R. 1901 (2), 116 P. R. 1901 (3), and Civil Appeal 75 of 1901 published as 86 P. R. 1904 (4) as being in his favour. It may be taken that the Full Bench case merely lays it down that among Punjabi agriculturists any one asserting that the adoption of a daughter's son, like defendant I in this case, is valid, must prove a special custom to that effect. 79 P. R. 1901 (2) is a case of Kangra Brahmins and can have little bearing upon a case of Delhi Jats. In it the Judges carefully limited their remarks to cases of persons belonging to non-agricultural tribes and we can safely ignore the ruling here. The ruling printed at 116 P. R. 1901 (3) deals with the matter of limitation, which we have already decided and also lays it down that 50 P. R. 1893 F. B. (1) merely prescribes the "general" presumption against the validity of a daughter's son to be made "at the outset, irrespective of any evidence such as *Wajib-ul-arz* or *Kiwaaj-i-am* or precedents which may be forthcoming at a later stage of the case." Ultimately, the adoption of a daughter's son was held valid among those Hindu Jats of Garbshankar *tahsil*, district Hoshiarpur, because there were

(1) 50 P. R. 1893 F. B. (*Ralla v. Budha*).

(2) 79 P. R. 1901 (*Sohnun v. Ram Dial*).

(3) 116 P. R. 1901 (*Hemraj v. Sahiba*).

(4) 86 P. R. 1904 (*Chuttan v. Ram Chand*).

in its favour four instances quoted in the *Riwaj-i-am*, two verified instances cited in Court, and long silence on the part of the reversioners.

In the ruling Civil Appeal 75 of 1901, published as 86 *P. R.* 1904 ⁽¹⁾, a case of Delhi Brahmins, held governed by a special custom of their own, it was ruled that the evidence proved numerous successions of daughter's sons. It is clear that such a ruling as this cannot affect the general presumption prescribed in the Full Bench case of 1893.

In the present case, then, we must hold that the presumption prescribed in 50 *P. R.* 1893 *F. B.* ⁽²⁾ stands and on the record there is no proof of a special custom. No doubt there is an entry of a special custom in the *Riwaj-i-am*, but it is not supported by instances quoted in itself nor by verified instances mentioned by witnesses. All or nearly all of defendant's own witnesses say plainly that there are in the tribe no instances of adoption of a daughter's son; and though the *patwari* mentions a few instances, they are of a very doubtful description.

To sum up, we hold that the suit is not barred by time because under the P. C. Ruling in *Tirbhuvan v. Rameshar* ⁽³⁾ in a suit for possession by a reversioner against a person who claims to hold a deceased person's immoveable property in virtue of an adoption by the latter, article 118, schedule II, Limitation Act, 1877 or 1908 has no application, the limitation applicable being that for a suit for possession of immoveable property. As a corollary we also find that the *P. R. F. B.* 1905 ⁽⁴⁾ is no longer a guide and that article 118 does not apply in either of the classes of cases specified in that judgment. We also hold that the general presumption among Jats of the Garhshankar *tahsil* of the Hoshiarpur district being, that the adoption of a daughter's son is invalid, no special custom has in this case been made out in favour of the validity of such an adoption. Lastly, we hold that no acquiescence such as would bar the suit has been established.

For these reasons we accept the appeal and decree plaintiff's claim with costs throughout.

Appeal accepted.

⁽¹⁾ 86 *P. R.* 1904 (*Ghuttan v. Ram Chand*).

⁽²⁾ 50 *P. R.* 1893 *F. B.* (*Ralla v. Budha*).

⁽³⁾ (1906) *I. L. R.* 28 *All.* 727.

⁽⁴⁾ 86 *P. R.* 1905 *F. B.* (*Kuram Dad v. Nathu*).

No. 45.

*Before Hon. Sir Arthur Reid, Kt. Chief Judge, and Hon. Mr.
Justice Johnstone.*

AZIM AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

ISMAIL AND KADIR BAKSH—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1283 of 1909.

Custom—Adoption—of step-son—Arains—Jullundur city.

Held, that the respondents, on whom the burden of establishing the custom was, had failed to prove that a sonless Arain of Jullundur city can adopt his step-son, who is not of his *got*.

*Further appeal from the decree of Q. Q. Henriques, Esquire,
Divisional Judge, Shahpur Division, dated the 6th October 1909.*

Sheo Narain, for appellants.

Kamal ud-din, for respondents.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—The question for consideration is 6th May 1911.
whether a sonless Arain of Jullundur city can adopt his step-son
who is not of his *got*.

The lower appellate Court has held that he can, relying on the fact that no religious principle underlies customary adoption by a Mahomedan and cited 2 instances. The plaintiffs appeal—

The 1st instance cited by the lower appellate Court was a decision by an officiating District Judge, who cited three instances for the conclusion that a gift of ancestral immoveable property to daughters and a step-son was good against collaterals,

The 2nd was a gift to a step-son maintained by a subordinate Civil Court. Both decisions were in 1898. In the 1st case the step-son had been brought up as a son, and married by the step-father. The instances cited by the Court were of step-sons inheriting with sons. Some only of the collaterals sued, and the instances cited were very possibly of sons who had developed affection for the step-sons.

In the 2nd instance the burden of establishing a custom entitling the plaintiff collateral to oppose a gift of occupancy rights to a step-son was laid on the plaintiff, following 31 *P. R.* 1896 (1).

(1) 31 *P. R.* 1896 *F. B.* (*Didaru v. Banna*).

The instance of 1874 referred to by the Court of 1st instance was of a suit by a son against a step-son, on the allegation that his father had given land to the step-son, on condition of the latter paying some debts of the donor which the donee failed to pay. The decision was based on the failure to fulfill the condition.

The *Riwaj-i am* is against the step-son and the plaintiffs are the brother and 2 nephews of the step-father, the adopter. In 24 P. R. 1905 ⁽¹⁾ it was held that the defendants, Arains of the Jullundur *tahsil*, had failed to prove that a sonless proprietor could give ancestral estate to his sister's son of another *got* in the presence of male agnates.

55 P. R. 1905 ⁽²⁾ was to the same effect, the *tahsil* of the Jullundur district in which the property was situate not being specified.

In 50 P. R. 1893 F. B. ⁽³⁾, a case between Arains of the Nawashahr *tahsil*, Jullundur, it was held that the burden of proving a custom making the adoption of a daughter's son, without the consent of sons of a brother, valid against them was on the party setting up the custom.

It was further held, that when a sonless man, in any land-holding group which recognizes a power to adopt, asserts that he is competent to adopt a non-agnate in the presence of near agnates without their consent, the presumption at the outset is against the power.

12 P. R. 1892 ⁽⁴⁾, 19 P. R. 1903 ⁽⁵⁾, and 51 P. R. 1906 ⁽⁶⁾ cited for the respondents do not help them, and they obtain no assistance from the *dicta* at p. 230 of the 1893 F. B. cited above.

The respondents have failed to discharge the burden of establishing the custom set up by them, and the appellants' suit must be decreed.

We decree the appeal and restore the decree of the Court of 1st instance, with costs of all Courts. Judgment pronounced.

Appeal accepted.

⁽¹⁾ 24 P. R. 1905 (*Ilahia v. Qasim*).

⁽²⁾ 55 P. R. 1905 (*Rukna v. Ghaus*).

⁽³⁾ 50 P. R. 1893 F. B. (*Rulla v. Budha*).

⁽⁴⁾ 12 P. R. 1892 F. B. (*Sita Ram v. Raja Ram*).

⁽⁵⁾ 19 P. R. 1903 (*Hayat Muhammad v. Ali Bakhsh*).

⁽⁶⁾ 51 P. R. 1906 (*Chajju v. Dalipa*).

No. 46.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
Shah Din.*

RAM NARAIN AND THE AMRITSAR COTTON MILLS
COMPANY, LIMITED—(PLAINTIFFS)—APPEL-
LANTS,

Versus

RAM KISHEN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 128 of 1911.

Companies—acts of directors, not properly appointed—Indian Companies Act, IV of 1882, section 92—Form of suit—error in, not ground for interference by Appellate Court—Company made plaintiff without its express consent—Civil Procedure Code, Act V of 1908, section 99, and Order 1, rule 10 (3)—Court's interference with matters of internal management—Chairman of meeting not liable to damages for coming to wrong decision.

Held, that acts *bonâ fide* done by a director or manager of a Company are valid, notwithstanding any defect that may afterwards be discovered in his qualification and this applies not only between the company and outsiders, but also between the Company and its members—Indian Companies Act, 1882, section 92.

Held also, that the form of a suit is not bad because the relief prayed for does not affect each defendant equally, and also that even if the suit had been open to objection on the ground of misjoinder, there having been no material prejudice to the defendants on the merits, the decree of the lower Court could not be reversed merely on this technical ground—Civil Procedure Code, section 99.

Held also, that a Company cannot be made plaintiff in a suit without its consent expressly given (order 1, rule 10 (3) of the Code) and neither one or several shareholders can sue in the name of the Company unless they were authorised by the majority at a general meeting of the Company or shewed that they have exhausted all reasonable means of obtaining the institution of the suit by the Company or that the case is one of urgency and the plaintiff has the support of the majority.

Held also, that one or more shareholders suing on his or their own behalf cannot obtain in a Court of law, a declaration that the election of certain persons as directors was null and void on account of irregularities or even illegalities in their election, nor an injunction to restrain, those persons from acting as directors, these being matters relating exclusively to the internal management of the Company, with which Courts generally decline to deal at the instance of any person other than the Company itself.

Held also, that a chairman presiding at a meeting of a Company has to decide to the best of his judgment all questions that arise at such meeting, e.g. the right of persons to vote or their disqualification, and if he acts *bonâ fide*, he is not liable to pay damages to any party, who can afterwards satisfy a Court of law, that a particular ruling of the chairman was erroneous or

that it resulted in such party being deprived of a right to which he is subsequently found entitled.

Appeal from the decrees of P. L. Barker, Esquire, District Judge, Amritsar, dated the 23rd January 1911.

Grey and Beechey, for appellants.

Shadi Lal and Parker, for respondents.

The judgment of the Court was delivered by—

17th May 1911.

RATTIGAN, J.—OR the 19th March 1910, plaintiff No. 1, Lala Ram Narain, filed a plaint in the Court of the District Judge of Amritsar and in this plaint he complained of certain wrong done to him, as a shareholder of the Amritsar Cotton Mills Company, Limited, at the annual general meeting of the members of that Company, which was held on the 27th February 1910. The said plaint runs as follows :—

“ 1. That the plaintiff, Lala Ram Narain, is and has, for “ some years, been a registered shareholder of the Amritsar “ Cotton Mills Company, the head office of which is at “ Amritsar, owning in his own right 81 shares and was the “ registered holder and owner of such shares on the 27th February 1910 when the annual ordinary general meeting of the “ shareholders was held at Amritsar.

“ 2. That the plaintiff, Lala Ram Narain, was present at “ the said meeting and had come to vote at such meeting and, “ with that view in accordance with article 59 of the Articles “ of Association, had previously deposited, at the registered “ office of the Company more than 48 hours before the meeting, “ 15 proxies comprising 1,082 votes of which a list is herewith “ appended, and thus the said plaintiff was in possession of 1,082 “ votes under the proxies and 33 votes under his own shares “ which 1,125 votes he intended to use at the meeting.

“ 3. That the defendant 1, Dr. Ram Kishen, acted as “ director and chairman at the said meeting though he was “ not duly qualified to act as such and was not even a director “ of the Company by the reason of the facts (a) that he “ was then holding and for some time had been holding an “ office of profit, viz., that of Medical Officer drawing a salary “ of Rs. 300 per annum under the Company and was thus under “ article 82 incapable of acting as director, and (b) that his “ son, Sri Kishen, who is joint with him in food and estate as “ a member of a joint Hindu family, was also holding an office “ of profit, viz., that of Engineer on a salary of Rs. 200 per “ mensem under the Company.

" 4. That at the said meeting the plaintiff Lala Ram Narain was not permitted by defendant, Dr. Ram Kishen, to vote, either in respect of his own shares or the proxies held by him, and was, under defendant 1's order as chairman, excluded from taking part in the meeting, and that the total number of votes held by him in his own right and under the proxies greatly exceeded the total number of votes held by the other members present at the meeting, many of whom also were willing to vote with the plaintiff, and that, by the unlawful and unwarranted action of the said defendant 1 the plaintiff was deprived of his rights, and resolutions were passed at the meeting contrary to his wishes and that of the majority of the shareholders.

" 5. That at the said meeting the plaintiff, Lala Ram Narain, was put up for election as a director and duly seconded, but the defendant 1 unlawfully and unwarrantably ordered that the said plaintiff's election could not take place, giving as a reason that the said plaintiff did not hold the requisite number of shares, which was not a fact, and illegally prevented the said plaintiff from being elected as director whereupon defendants 2, 3 and 4 were wrongly and invalidly elected and the said plaintiff was also wrongly excluded from taking part in the voting.

" 6. That, but for the fact that defendant 1, Dr. Ram Kishen, was in the chair and unlawfully and wrongly prevented plaintiff from voting and from being put up for election, the plaintiff, Lala Ram Narain, would have been elected a director and the election of defendants 2, 3 and 4, would not have been passed at the meeting and as a consequence the proceedings and resolutions passed at the meeting of 27th February and especially the election of defendants 2, 3 and 4 are null and void.

" 7. That the defendants 1—8 are professing to be, and to act, as directors of the said Company whereas the Board of Directors for the reasons aforesaid is not duly constituted and the defendants 1, 2, 3 and 4 are not legally qualified and elected directors, and cannot act as such, and that the defendants 1—8 are intending unlawfully to carry out the resolutions passed on the 27th February at the aforesaid meeting and to pay dividends at the rate of 6 per cent. per annum to the shareholders.

" 8. That the defendants 1—8 have been given notices of suit and warned against carrying out the resolutions of 27th February and against acting as directors, but they, nevertheless, have not heeded the notices.

" 9. That the cause of action arose on the 27th February 1910 (and subsequently) at Amritsar.

" 10. That plaintiff values his claim for the declaratory decree and injunction mentioned below at Rs. 3,000 and his claim for damages at Rs. 2,500, total value of suit for jurisdiction and for purposes of Court fee being Rs. 5,500.

" 11. That it is prayed that a decree be passed (1) declaring that the resolutions passed at the meeting of the shareholders on the 27th February and, in particular, the resolutions authorizing the payment of dividends to the shareholders and electing defendants 2, 3 and 4 as directors, and the proceedings of the meeting excluding the plaintiff from voting and from being elected as director are null and void and that an injunction be issued to the defendants 1—8 restraining them or such of them as the Court may order from acting as directors and from carrying out the resolutions aforesaid and paying the dividends and that the plaintiff, Lala Ram Narain, may be awarded the sum of Rs. 2,500 as damages against defendant 1, Dr. Ram Kishen, or such defendants as may be held liable to plaintiff for the injury done to him on the facts above stated and that the costs of the suit may be awarded to plaintiff and such further or other relief as the plaintiff may be found entitled to.

" I, Ram Narain, plaintiff, state that the facts stated above in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 are true to my knowledge.

(Sd.) RAM NARAIN,

" H. BEECHEY,

Counsel for plaintiff.

It is admitted that this plaint was signed and verified by Lala Ram Narain alone, and that it was on his own initiative, and without any reference either to the directors of the Company or to the shareholders of the Company, that the name of the Company was added as a co-plaintiff. With this plaint, Lala Ram Narain presented an application (through his Counsel, Mr. Beechey) in which it was asserted that the "real voice" of the Company was on plaintiff's side and that the latter was suing not only for himself, but also in reality for the Company and the majority of the shareholders. Plaintiff therefore prayed in this application that the Court might be pleased, under order 1, rule 8, of the Civil Procedure Code, "to permit him to sue on behalf of the aforesaid shareholders and the Company and to give notices as required by the said rule." Plaintiff further added that

“if the Court be not pleased to allow the suit to proceed at the instance of the Company, it may be pleased to make the Company a defendant along with the others.”

The persons who were made defendants in the suit were the directors of the Company, each in his individual capacity.

Upon the said application the District Judge passed the following order:—“Under order 1, rule 8, Civil Procedure Code, I appoint plaintiff to sue on behalf of the 145 shareholders whose proxies he held for the meeting of the Company on the 27th July 1910, and also on behalf of the Company. Notice to such shareholders and the Company to be given by advertisement in three consecutive issues of the *Tribune* and *Hindustan* newspapers and in one issue of the Punjab Government Gazette.” This order was dated the 19th March 1910.

The defendant directors, both by separate petition and in their written statement, took exception to the impleading of the Company as a co-plaintiff. They pointed out that under article 74 of the Company's Articles of Association it was only the directors of the Company who could sue or be sued in the name of the Company and that the plaintiff had no authority from the Company to use its name as a co-plaintiff. Of the 145 shareholders to whom notice had been issued under order 1, rule 8, eighteen applied to the Court to be made co-plaintiffs, and their prayer was granted. The District Judge, by his order, dated the 21st May 1910, held that the plaintiff, Ram Narain, was justified in impleading the Company as a co-plaintiff inasmuch as on the allegations in the plaint, the interests of the Company were on the same side as his, and that it was not necessary for the plaint to be signed and verified by the plaintiff Company as well as by plaintiff No. 1 (No. 48, P. R. 1896) (1). The suit therefore proceeded with Lala Ram Narain as plaintiff No. 1, the Amritsar Cotton Mills Company, Limited, as plaintiff No. 2, and various shareholders as plaintiffs Nos. 3—20. Furthermore plaintiff No. 1 was under the order of the District Judge, dated the 19th March 1910, suing on behalf of the remaining shareholders, in whose name he held proxies for the meeting of the 27th February 1910.

In addition to pleadings Lala Ram Narain was incompetent to implead the Company as a co-plaintiff, the defendant directors pleaded that (1) there was a misjoinder of parties and causes of action; (2) the claim for damages against defendant

(1) 48 P. R. 1896 (*Chandi Mal, v. Deva Singh*).

No. 1 was personal to plaintiff No. 1; (3) Ram Narain's shares were in pledge with the Allahabad Bank since 1907 and that he was therefore not in full enjoyment of his rights as a shareholder on the 27th February 1910; (4) some of the proxies held by plaintiff No. 1 were invalid and he had no right to make use of 33 of his own votes; (5) defendant No. 1 was the lawful chairman of the meeting and plaintiff No. 1 had accepted him as such; (6) the resolutions passed at the meeting were perfectly valid and good; and (7) plaintiff No. 1 was ineligible as a candidate for a directorship, as his shares were in pledge with the Allahabad Bank, and none the less so because the Bank had after the closing of the Company's books for transfer purposes, notified the secretary of the discharge of the said lien. Defendants further generally pleaded that plaintiff No. 1 had suffered no loss and was not entitled to any relief. The District Judge, by his order of the 21st August 1910, to which we have already referred, held that there was no misjoinder of persons or causes of action "inasmuch as the legality "or illegality of the resolutions passed at the general meeting "which is of the essence of the suit, is a matter in which both "the Company and the shareholders are equally interested "and in which both alike are entitled to relief as against those "whose wrongful action was the cause of such illegality." In this order he also held that "if the chairman of the Board of "Directors so misconducts the proceedings of the general "meeting of the Company as to invalidate all the resolutions "passed at that meeting, the Company has an obvious cause "of action against the chairman and the other directors who "support him."

Issues Nos. 1 and 2 having thus been determined the District Judge proceeded with the trial of the case upon the other issues, which were as follows :—

"(3). Are the proceedings of the meeting of the 27th February 1910 null and void for reason of the facts (a) that the "meeting was not duly held and convened having been presided "over by a person who was not competent to so preside? (b) that "the plaintiff (i.e., Ram Narain) was improperly excluded by the "chairman from voting or taking part in the proceedings?"

"(4). Is plaintiff entitled to (a) the declaration sought in "paragraph 11 of the plaint, and (b) to any, and if so, what "damages?"

After taking the evidence of the parties, the District Judge held (1) that the chairman, Dr. Ram Kishen, was not disqualified under article 82 of the Articles of Association, from

being either a director or the chairman of the meeting, simply because prior to his election as such director, he held the post of medical adviser to the Company at a fixed salary of Rs. 300 per annum, or because his son Sri Kishen, with whom he was not a partner, held the post of Engineer to the Company on a salary of Rs. 200 per mensem; (2) that whether or not at the date of the meeting the lien of the Allahabad Bank upon Ram Narain's shares had been duly discharged, the pledge of such shares did not amount to a "transfer" and left the owner of the shares in full enjoyment of his rights as a shareholder, and that consequently, even if there had been no discharge of the lien, Ram Narain was entitled to vote at the meeting and was eligible for the Board of Directors; (3) that there was no proof that Ram Narain would have been elected a director, had his name been submitted to the meeting; (4) that consequently Ram Narain was not entitled to a declaration that the election of the three directors at that meeting was null and void, or to an injunction restraining the latter from acting as such directors; (5) that the chairman acted *bonâ fide* though erroneously, in declaring that Ram Narain was not entitled to vote, or to be proposed as a candidate for a directorship, and (6) that Ram Narain was therefore entitled merely to nominal damages against the said chairman Dr. Ram Kishen. The District Judge, accordingly dismissed the suit in respect of the prayer for declaration and injunction, but granted Lala Ram Narain a decree for one *pice* only as against Dr. Ram Kishen, defendant No. 1. He further directed that Lala Ram Narain and Dr. Ram Kishen should bear their own costs, but that the former should pay the costs of the remaining defendants.

From this decree Lala Ram Narain (joining the Company as a co-appellant) and Dr. Ram Kishen have both appealed, and we have heard the case argued at a very considerable length by the learned Counsel who appeared on their respective behalf. Before proceeding to deal with these arguments, we may at once note that Mr. Grey for the appellant, Lala Ram Narain frankly admitted that it was not the intention of his client to impeach in any wise the acts *bonâ fide* done during the last year by any of the directors of the Company whether such directors were or were not duly elected at the meeting of the 27th February 1910. Both Mr. Grey and Mr. Beechey assured us that Lala Ram Narain had no desire to embarrass the Company by challenging any of the actions of such directors provided of course, there had been no fraud or other misconduct on their part, and that their client and his friends accepted as entirely

valid and binding in every thing done by these Directors in the *bond fide* discharge of their duties, although they may not have been legally elected to their posts as directors. This undertaking on the part of Lala Ram Narain renders it unnecessary for us to deal at length with this aspect of the case, but we may observe in passing, that it is well established law that the acts *bond fide* done by a director or manager are valid, notwithstanding any defect that may afterwards be discovered in his qualification and this not only between the Company and outsiders, but also between the Company and its members (section 92 of the Indian Companies Act, 1882 ; "The Laws of England," Volume 5, pages 214, 241, *Dawson v. African Consolidated Land and Trading Company* ⁽¹⁾, *British Asbestos Company v. Boyd* ⁽²⁾ and Article 80 of the Company's Articles of Association).

A number of minor points which were urged, more or less seriously in the Court of the District Judge, have been dropped in this Court, and the only questions upon which we are now asked to give a decision are the following :—

(1). Was it competent to Lala Ram Narain to implead the Company as a co-plaintiff with himself against the wishes of the directors and without the express authority of a meeting of the shareholders ?

(2). If the Company was wrongly impleaded as such co-plaintiff should not its name be struck out as such plaintiff ? If so, can any decision be given on the merits of the case which will be binding on the Company as such ?

(3). Is the frame of the suit bad on the ground of misjoinder of persons and causes of action, and if so, what are the consequences of such misjoinder ?

(4). Was defendant No. 1, Dr. Ram Kishen, disqualified from acting as director of the Company and as chairman of the meeting held on the 27th February 1910 ? If so, are the whole of the proceedings of that meeting null and void, so far as concerns the election of the directors ?

(5). Was Lala Ram Narain on the date of the said meeting not qualified to vote as a shareholder or to be proposed for election as a director ? If he was duly qualified in both respects, was the election of S. Bhagwan Singh, S. Buta Singh and R. B. Gagar Mal as directors invalid owing to the ruling of the chairman that Lala Ram Narain was not eligible for the Board of Directors ?

(1) (1898) 1 Ch. 6 (C. A.).

(2) (1903) 2 Ch. 439.

(6). Does a claim for damages lie against defendant No. 1 in any case?

(7). To what relief, if any, is plaintiff No. 1 entitled?

We find it unnecessary, in the view that we take, to give any decision upon the third question. We are, however, inclined to hold that the suit was not bad on the ground of misjoinder either of persons or of causes of action, all the plaintiffs including the plaintiff Company were interested in the cause of action which accrued to Ram Narain when he was declared not to be qualified either to vote as a shareholder or to be proposed for election as a director, and they all are equally interested in the further question whether the election of directors at the meeting of the 27th February 1910 is good or invalid. On the other hand, the various defendants were as directors of the Company, interested in plaintiff's cause of action as stated in the plaint (O. 1, r. 3, and O. 2, r. 3) and the mere fact that the relief prayed for did not affect each defendant equally would not render the frame of the suit bad (O. 1, r. 5). Furthermore, even if the suit had been open to objection on the ground of misjoinder, there has been no material prejudice to the defendants on the merits, and the decree of the District Judge could not be reversed merely on this technical ground (section 99, C P C.).

But we need not discuss this point at length as in our opinion, the appeal of plaintiff, Lala Ram Narain, must fail on other grounds.

In the first place we must hold that the Company was unjustifiably impleaded as a co-plaintiff, Lala Ram Narain admittedly had not the authority of the Company for impleading it as a co-plaintiff and for putting its name on his plaint in such capacity. The application which he filed with his plaint makes this clear and the want of authority is not denied, now no person and *à fortiori* no incorporated Company can be made a plaintiff without his or its consent (O. 1, r. 10 (3), C. P C.) and this we take to mean *consent expressly given*. In the present case, it is urged that the Company, as such, had notice of the suit and that as the Company did not repudiate the action brought in its name, it must be taken to have "consented" to it. But "consent" in this sub-clause means, consent given expressly, and we know that the Directors, who under Article 74 of the Articles of Association, in the ordinary course of things, alone are entitled to sue or to be sued in the name of the Company, immediately repudiated this action on behalf of the

Company. It is a general rule that an individual shareholder is not competent to make use of the name of the Company as a plaintiff in an action and the rule is the same with regard to a number of the shareholders. Before they can institute a suit in the name of the Company, such shareholders must shew either that they have been authorised by the majority at a general meeting of the Company to institute the suit or that they have exhausted all reasonable means of obtaining the institution of the suit by the Company, or that the case is one of urgency, in which latter event they institute the suit at their peril and subject to their being able to satisfy the Court that they have the support of the majority, (see Buckley's "Companies' Act" 7th Edition, pages 522—523; *Marshall's Valve Gear Company v. Manning* (1). The Law of England, (Volume 5, pages 318,² 319). In the case of *La Compagnie de Mayville v. Whithy* (2) a Director of a Company, one Seal, brought an action in the name of the Company to prevent certain of his Co-Directors from carrying out a resolution appointing a certain third person Director in his place and appointing Solicitors and Bankers—Seal, therefore, obtained a Memorandum signed by five of the seven signatories to the Memorandum of Association authorizing him to use the name of the Company in his proposed action. Subsequently a meeting of the Company was held and a resolution passed to have the name of the Company struck out, as used without authority. Upon these facts, and upon the motion to strike out the name of the Company as plaintiff, Lindley L. J. observed (at page 803):—"Mr. Seal had no authority whatever "to use the name of the Company in these proceedings. If "what was done on the 24th February is valid, the appointment of the Solicitor is valid and Mr. Seal could not possibly "have any authority at all. But, he says, I brought this action "and served this writ before that meeting, when all I knew "was the irregular meeting of the 14th February. But what "authority has he even in that case? He has not got the "authority of any meeting of the shareholders. He has got "the authority of five out of the seven subscribers, it is true; "got by him, I suppose, by sending round and asking them for "their sanction. But that authority seems to me not worth "the paper it is written upon. If authority is wanted to use "the name of the Company it must be authority got from the "proper quarter either from the Directors or from the shareholders convened for the purpose. This is neither one nor "the other." Kay L. J. added, "The proper course (as is

(1) 78 L. J. Ch 43.

(2) (1895) 1 Ch. 788.

“pointed out in *Foss v. Harbottle* and has been held ever since),
“in the case of any matter which relates to the internal
“management and trade affairs of a Company, is to call a
“meeting, and that is practically the only remedy, which this
“Court allows a Director or shareholder of a Company to take,
“otherwise we should have Companies torn to pieces by litigation
“of this kind. The Court has always set itself resolutely
“against such litigation.”

Mr. Beechey in support of plaintiff, Lala Ram Narain's action in impleading the Company as co-plaintiff, relied upon the observations of Jessel, M. R. in the case of *Pender v. Lushington*, (1) but we do not think that that very learned Judge's dicta afford him any support. The Master of the Rolls was there dealing with a case in which it was imperative that action should be taken without delay in order to prevent Directors from acting in a certain way. The matter was one of which a shareholder, as such, could not complain in his individual capacity owing to the well established rule laid down in the leading case of *Foss v Harbottle*, and as a result the action was brought, though without express authority, in the name of the Company. In the circumstances, the Master of the Rolls held, that he was not called upon to strike out the name of the Company at that stage of the proceedings. He observed, “The Company being a proper plaintiff and the
“question being one of which the Company might complain, the
“majority of the Company being of that opinion and there not
“being time to call a general meeting, what is the Court to do?
“Is it to refuse justice altogether and say, it being a case
“for an injunction that the directors are to have for several
“weeks (for the articles require three weeks' notice of a general
“meeting) the power of destroying the property and rights of
“the shareholders? It would be an absolute denial of justice
“and it appears to me that the Court of appeal in the case of
“*McDougall v. Gardiner* have deliberately taken that view.
“James L. J. says, “Any one of the shareholders might
“have filed his bill in the name of the Company and then
“if the directors had said, you are not the Company, the
“majority do not act with you but with us, the Court would
“as it has done in other cases, have taken the means of
“ascertaining which party, the plaintiffs or the defendants, really
“represent the majority? I suppose the Lord Justice means
“that the Court may direct a meeting to be held. But what
“is the Court to do in the meantime if it is satisfied that a

(1) 6 Ch. Div. 70.

"real majority is at the time in favour of bringing the action ?
"Surely, the Court ought to grant the injunction in order to
"keep things in status quo, on the assumption that the majority
"at the former meeting have not changed their mind !.....I
"think I ought not to take away the name of the Company
"on the record, but to let the summons stand over, leaving
"either party to call a meeting to decide whether the Company's
"name is to be used or not."

Now, it is quite clear that the Master of the Rolls did not intend in this case to depart from the general rule as above enunciated. On the contrary, he granted a temporary injunction because he saw no reason to doubt that the plaintiff had the majority of shareholders behind him. The former meeting had proved that this was the case and it was upon this assumption and also because the matter was one of urgency that the temporary injunction was granted. It is also to be noted that the Master of the Rolls directed the summons to stand over in order that a general meeting of the Company might be called to consider the question. The facts of the case to which we have referred are entirely different from those in the case before us. Hence there is no question of urgency and plaintiff, Lala Ram Narain, cannot point to any meeting in which the majority of the shareholders have expressed an opinion favourable to the institution of the present suit. As we have already remarked, circumstances may exist in which it is competent to one or more shareholders to use the name of the Company in a suit against the directors of the Company, but those cases are exceptional, and in the present case we can find no justification for the use of the Company's name as a co-plaintiff. There is no urgency, and it was open to plaintiff as a shareholder to convene a meeting of the Company to authorize his use of the Company's name. He has not availed himself of this opportunity despite the fact that the defendant directors challenged his right to make such use of the Company's name and that under the provisions of the Civil Procedure Code no "person" (including a corporate body) can be made a plaintiff without his (or its) consent.

We must accordingly strike out the name of the Company as a co-plaintiff.

Obviously in view of the relief sought, it would be idle to grant plaintiff a decree as regards the declarations and injunction for which he prays, unless the Company is a party to this suit, otherwise any such declaration or injunction would be ineffectual against the Company and therefore practically value-

less. For this reason we would have been prepared to act under O. 1, r. 10 (2) of the Civil Procedure Code and add the name of the Company as a co-defendant in the suit, were it not that (for reasons to be given) we do not feel called upon to do so, as in our opinion, plaintiff's claim must fail in respect of all the reliefs for which he prays.

Plaintiff, Lala Ram Narain, in his appeal before us, asks for the following reliefs :

(1) a declaration that on the 27th February 1910 he was entitled to vote at the general meeting, and that he was qualified to be a director of the Company ;

(2) a declaration that the election of defendants Nos. 2, 3 and 4 was null and void, because, :

(a) Dr. Ram Kishen, the Chairman of the meeting, was not qualified to act as such,

(b) Plaintiff was wrongfully excluded from offering himself for election ;

(3) an injunction to restrain the defendant directors, from acting as such directors ; and

(4) substantial damages against defendant No. 1, Dr. Ram Kishen, for having unlawfully deprived plaintiff of his legal rights as a duly qualified shareholder and candidate for a directorship.

We shall deal with these points *seriatim* :—

(1) It is admitted that plaintiff is *now* entitled to vote at all meetings of the Company and is fully qualified to be a Director of the Company, if he is elected. A declaratory decree affirming his rights on the 27th February 1910 would, therefore, be of no more than academical interest, unless it is further held that by reason of his exclusion from voting and from offering himself of a Director, all subsequent acts of the Directors who were then elected are invalid and that the election of these Directors must be cancelled. With the latter question we shall deal presently but we may anticipate by saying that in our opinion that is a matter which it is not open to the plaintiff as a shareholder to challenge in the Courts. As to the other question, we need say no more than that plaintiff's learned Counsel have stated that it is not plaintiff's intention to contest the validity of acts done *bonâ fide* by such directors, merely on the ground of the irregularity in connection with their election. The District Judge has in the exercise of his discretion, refused to grant this declaration, and in view of the fact that

it would be of no practical use to plaintiff, we see no reason to interfere with his order.

(2) and (3). The questions whether Dr. Ram Kishen was or was not a duly qualified Director, whether he was qualified to act as Chairman of the General Meeting, and whether defendants Nos. 2, 3 and 4 were, or were not, duly elected Directors of the Company, are matters which, in our opinion, relate exclusively to the internal management of the Company's affairs. With such matters the Court declines to deal at the instance of any person other than the Company itself—*Foss v. Harbottle* ⁽¹⁾ *Mozby v. Alston* ⁽²⁾, *McDougall v. Gardiner* ⁽³⁾. In the words of James L. J. in the case last cited:—"Nothing connected with internal disputes between the shareholders is to be made the subject of a bill by one shareholder on behalf of himself and others, unless there be something illegal, oppressive or fraudulent...; unless there is something *ultra vires* on the part of the Company *qua* Company, or on the part of the majority of the Company, so that they are not fit persons to determine it, but every litigation must be in the name of the Company if *the Company really* desires it. Because there may be a great many wrongs committed in a Company, there may be claims against Directors, there may be claims against officers, there may be claims against debtors, there may be a variety of things which a Company may well be entitled to complain of but which as a matter of good common sense they do not think it right to make the subject of litigation; and it is the Company, as a Company which has to determine whether it will make anything that is a wrong to the Company, a subject matter of litigation or whether it will take steps itself to prevent the wrong from being done. If the majority of the Company really are in favour of any particular shareholder who has been interfered with improperly by misconduct of a Director, by misconduct of a Chairman, by miscarriage of a meeting or of certain shareholders at a particular date, if the Company think that any shareholder has anything which ought to be made the subject of complaint there is never any difficulty whatever arising from the apparent possession of the seal by the Directors, or by any such cause in filing a bill in the name of the Company if the majority of the Company desire it to be filed the whole question comes back to a question of internal management, that is to say, whether the meeting ought

(1) 2 Ha. 461.

(3) 1 Ok. D. 13.

(2) 1 Ph. 790.

“or ought not to be held in a particular way; whether the
“Directors ought, or ought not, to have sanctioned certain
“proceedings which they are about to sanction; whether one
“Director ought or ought not to be removed, and whether
“another Director ought or ought not to have been appointed.
“If there is some one managing the affairs of the Company
“who ought not to manage them, and if they are being
“managed in a way in which they ought not to be managed,
“the Company are the proper persons to complain of
“that.”

In the same case Mellish L. J. remarked—“Looking at
“the nature of these Companies, looking at the way in which
“their articles are framed, and that they are not all lawyers
“who attend these meetings, nothing can be more likely than
“that there should be something more or less irregular done
“at them—some Directors may have been irregularly appoint-
“ed, some Directors as irregularly turned out, or something or
“other may have been done which ought not to have been
“done according to the proper construction of the articles. Now,
“if that gives a right to every member of the Company to
“file a bill to have the question decided, then, if there
“happens to be one cantankerous member or one member who
“loves litigation, everything of this kind will be litigated,
“whereas if the bill must be filed in the name of the Com-
“pany, then, unless there is a majority who really wish for
“litigation, the litigation will not go on.....In my
“opinion, if the thing complained of is a thing which in sub-
“stance the majority of the Company are entitled to do, or
“if something has been done irregularly which the majority
“of the Company are entitled to do regularly, or if something
“has been done illegally which the majority of the Company
“are entitled to do legally, there can be no use in having a
“litigation about it, the ultimate end of which is only that a
“meeting has to be called and then ultimately the majority
“gets its wishes The majority are the only persons
“who can complain that a thing which they are entitled to
“do has been done irregularly.....In my opinion that is the
“rule to be maintained. Of course if the majority are abusing
“their powers, and are depriving the minority of their rights
“that is an entirely different thing and then the minority
“are entitled to come before this Court to maintain their rights
“but if what is complained of is something, which the majority
“are entitled to do, has been done or undone irregularly, then,
“I think, it is quite right that no body should have a right

“to set that aside, or to institute a suit in Chancery about it except the Company itself” (See also *Russell v. Wakefield Waterworks Company* (1), and of *Alexander's case* (2)).

In the present case there is no suggestion that the majority of the Company are abusing their powers or depriving plaintiff of his rights, on the contrary his rights are now fully admitted, and the sole question is whether the persons who were elected directors at the meeting of the Company on the 27th February 1910 are to be allowed to retain their office, their election having been according to plaintiff brought about by irregularities, or even illegalities. This, according to the authorities, is a matter solely for the Company to determine, and it is not open to an individual shareholder to raise the question *suo motu* by proceedings in Court. As remarked by Bowen L. J. in the case of *Harbin v Phillips* (3), “No one can doubt that the Court ought not to interfere in the conduct of the Company's business further than is absolutely necessary. A meeting of the shareholders is at once looked to as the source from which help can come. People ought to be allowed as far as possible to manage their own affairs without interference by a Court of law.”

(4) The last question is whether upon the assumption that plaintiff was wrongly excluded from voting at the meeting of the 27th February 1910, and was erroneously declared by the Chairman to be ineligible as Director of the Company plaintiff, Lala Ram Narain is entitled to claim damages against the said Chairman? It is not asserted and there is no evidence to suggest that the Chairman, Doctor Ram Kishen, was actuated by malice in ruling against plaintiff in both respects at the said meeting. Or the contrary, it is not denied that he acted *bonâ fide* and the proceedings prior to the meeting show that it was only after consultation with other Directors, and due consideration, that the Chairman arrived at the conclusion that plaintiff was disqualified both from voting and from being put up as a candidate for the Board of Directors. That conclusion may have been right or it may have been wrong, but in deciding the question, the Chairman apparently acted with perfect honesty and to the best of his abilities, as Mellish L. J. observed in the passage of his judgment above quoted “all those who attend Company Meetings are not lawyers,” and mistakes are frequently made. Doctor Ram Kishen is not a

(1) 20 Eq. 474.

(2) (1900) 2 Ch. 56.

(3) 23 Ch. D. at pp. 36, 37.

wyer, and he gave his decision *bonâ fide* and without malice and we think it would be most inequitable to hold that he was in the circumstances liable to be mulcted in damages because a Court of law subsequently found that he had given a wrong decision upon a question of law which necessitated very lengthy arguments of learned Counsel for its elucidation. In connection with the question of damages in cases such as the present, reliance is sometimes placed upon the judgment of Holt C. J. in the celebrated case of *Ashby v. White* ⁽¹⁾, where it was broadly laid down "*ubi jus ibi remedium*" and that the mere deprivation of a man's legal right entitles the latter to damages. No reference was made by learned Counsel on either side to this case, and perhaps, from the appellant's point of view, advisedly, as there can be no doubt that the broad principle there enunciated is not now accepted as entirely correct. The more correct view of the law is now admitted to be that propounded by Abbott C. J., in the case of *Cullen v. Morris* ⁽²⁾. In the latter case the plaintiff claimed damages against the defendant as the High Bailiff of the City of Westminster for refusing the vote of the plaintiff at the election of a citizen for the City of Westminster. In charging the Jury, the Chief Justice said, "Then if the plaintiff had a right to vote, the question is whether the action be maintainable under the circumstances of the case. On the part of the plaintiff, it has been contended that he has a maintainable right of action without at all referring to the motives by which defendant was influenced in rejecting his vote, and independently of the proof of any malicious intention on the part of the defendant. On the part of the defendant it has been contended that an action is not maintainable for merely refusing the vote of a person, who appears afterwards really to have had a right to vote, unless it also appears that the refusal resulted from a malicious and improper motive, and that if the party act honestly and uprightly according to the best of his judgment, he is not amenable in an action for damages. I am of opinion that the law as it has been stated by the Counsel for the defendant is correct. The returning officer is, to a certain degree a ministerial officer, but he is not so to all intents and purposes. Neither is he wholly a judicial officer; his duties are neither wholly ministerial nor wholly judicial, they are of a mixed nature. It cannot be intended

(¹) *Lord Raymond*, p. 938.

(²) 20 R. R. 742.

“ that he is to exercise no judgment, no discretion whatsoever
“ in the admission or rejection of votes, the greatest confusion
“ would prevail if such a discretion were not to be exercised.
“ On the other hand, the officer could not discharge his duty
“ without great peril and apprehension, if in consequence of a
“ mistake, he became liable to an action. It has been urged
“ that Lord Holt, who with great honour to himself, once filled
“ this seat, intimated his opinion that the mere refusal of
“ the vote to a person entitled to vote, would give the party
“ a right to sue the returning officer. Whether he ever did
“ say so or not we do not certainly know, for the reports of
“ that case are very imperfect. No one entertains a greater
“ veneration for the learned Judge than I do, but if he did so
“ express himself, I am bound to deliver my opinion that he
“ was mistaken. The case alluded to (*Ashby v. White*) had been
“ tried by a jury, and upon the face of the record the defend-
“ ant was charged with malice, and when a writ of error was
“ brought, the record itself was conclusive as to the malice
“ of the defendant, since the Court could look at nothing beyond
“ the record.”

This ruling was cited and approved in *Tozer v. Child* ⁽¹⁾ in which it was held that a Returning Officer was a quasi Judge, and as such not subject to an action for damages, if he decides honestly and without malice, though erroneously, that a certain person is not entitled to a vote. Of course, in cases when the defendant is a *purely Ministerial Officer* and as such bound to accept the plaintiff's vote, a refusal to accept the vote would be ground for an action for damages without any allegation of malice (See *Pickering v. James* ⁽²⁾). But a Chairman who presides over a meeting of a Company is in no sense a *purely Ministerial Officer*; he has to decide to the best of his judgment, all questions that arise at such meeting as to the validity or invalidity of certain resolutions, as to the right of persons to vote or as to their disqualification from exercising that right and various other difficult questions. He is, in the words of Abbott C. J. ‘neither wholly a Ministerial Officer “ nor wholly a Judicial Officer and his duties are of a “ mixed “ nature.” To hold that a person who is placed in this responsible position, is liable to an action for damages at the instance of any party who can afterwards satisfy a Court of law that a particular ruling on the part of the Chairman was erroneous or that it resulted in such party being deprived of a right

⁽¹⁾ 26 L. J. Q. B. 151.

⁽²⁾ L. J. 8 C. P. 489.

to which he is subsequently found entitled would be tantamount to rendering it impossible for any person to accept the duties of a Chairman which are otherwise quite sufficiently onerous and difficult. Apart from authority, we could not possibly subscribe to any such proposition, and we are glad to find that authority is entirely in favour of the view which we ourselves hold.

As a result of what has been said above, we dismiss the appeal of Ram Narain and we accept the appeal of Dr. Ram Kishen and dismiss plaintiff, Ram Narain's suit *in toto*.

As regards costs, we think the most equitable order to pass is that parties bear their own costs in this and the Lower Court. While we have no doubt that Dr. Ram Kishen acted honestly and without any improper motive, we are not prepared to say that he was correct in holding that plaintiff had "no voting right" at the date of the meeting. In our opinion both parties have much to urge in favour of their respective cases and both appear to have been acting thoroughly *bonâ fide*.

No. 47.

Before Hon. Sir Arthur Reid, Kt. Chief Judge, Hon. Mr. Justice Kensington and Hon. Mr. Justice Rattigan.

GALE—(OF LAHORE)—PETITIONER,

Versus

GALE—(OF KALKA)—RESPONDENT.

Matrimonial case No. 2 of 1911.

Divorce—Jurisdiction of Chief Court, both parties residing within its jurisdiction though not together—Indian Divorce Act, IV of 1869, section 3 (1).

{ *Held*, that the Chief Court, Punjab, has jurisdiction to entertain a petition for divorce filed by a petitioner who last resided with her husband within the jurisdiction of the Bombay Court and at the date of filing the petition resided within the jurisdiction of the Chief Court, the respondent also residing at that date within the jurisdiction of that court, though apart from the petitioner.

Petition of wife for dissolution of her marriage with her husband under section 10, Act IV of 1869.

Petman, for petitioner.

Nemo, for respondent.

The judgment of the Chief Judge and Kensington J. was delivered by—

19th May 1911.

SIR ARTHUR REID, C. J.—The question for consideration is whether this Court has jurisdiction to entertain a petition for divorce filed by a petitioner who last resided with her husband within the jurisdiction of the Bombay Court and at the date of filing the petition resided within the jurisdiction of this Court. The respondent also residing at that date within the jurisdiction of this Court, though living apart from the petitioner. The decision turns on the interpretation of the last paragraph of section 3 (1) of the Divorce Act, “within the “local limits of whose ordinary appellate jurisdiction, or of “whose jurisdiction under this Act, the husband and wife reside “or last resided together.” *Durand v. Durand* (1) is directly in point. The parties therein last resided together at Madras and at the date of presentation of his petition by the petitioner, the husband, in the Court of the Recorder of Rangoon he was living at one place in Burma and the respondent was living at another place in Burma. The Court held that the Recorder of Rangoon had jurisdiction. *Wingrove v. Wingrove* (1) on the same page of the same volume is to the same effect though the facts are not so clearly stated. The punctuation of the words above cited “the husband and wife reside or last resided together” indicates clearly that “together” must be read with “last resided” only. Had the intention of the legislature been to make “together” apply to “reside”, we should have expected a comma after “reside” and after “resided.” The fact that the parties resided at the date of the presentation of the petition within the jurisdiction of this Court, though not together, gives this Court jurisdiction.

Our answer to the reference therefore is in the affirmative.

The judgment of Rattigan J. was as follows:—

22nd May 1911.

RATTIGAN, J.—In view of the decision in *Durand v. Durand* (1) and of the fact that the learned Chief Judge and my brother Kensington have no doubts upon the question referred to the Full Bench, I am not prepared to differ. At the same time I am not, I confess, fully satisfied that the word “together” was not intended to qualify the word “reside” as well as the words “last resided.” Jurisdiction to grant dissolution of marriage ordinarily depends upon the domicile of the parties, but the Legislature of this country has, for reasons of policy

(1) (1870) 14 W. R. 416.

made it depend upon residence alone. But I am not fully assured that the intention of the Legislature was not to require something in the nature of a "matrimonial home" as a substitute for "domicile." Prior to the decision of the Privy Council in the leading case of *Le Mesurier v. Le Mesurier* ⁽¹⁾ it was understood that the Court in England would have jurisdiction to dissolve a marriage if the "*matrimonial home* of the parties" was in England, (*Niboyet v. Niboyet* ⁽²⁾) but apparently nothing short of that sufficed to give jurisdiction to that Court and I doubt if it would have entertained any suit for dissolution of marriage upon the bare ground that at the time of suit the husband and wife happened to be residing within its jurisdiction, though not in one home. As the law now stands, the English Courts have no jurisdiction in such cases, even though the matrimonial home is in England unless the parties are domiciled in England. It is somewhat anomalous therefore to hold that, while the jurisdiction of the English Courts has been very considerably curtailed by the decision of their Lordships of the Privy Council, the Courts of this country are given jurisdiction to dissolve the marriage not only of parties who at sometime or other have had their matrimonial home within the local limits of the jurisdiction of these Courts, but also of persons who may never have had such a home within these limits but who happen for the time being to reside (probably for merely temporary purposes) in separate places within such limits.

Upon the weight of authority, however, and in deference to the view of my colleagues, I agree that the answer to the reference should be in the affirmative.

No. 48.

Before Hon. Mr. Justice Rattigan.

FAZLA—(PLAINTIFF)—PETITIONER,

Versus

BADAN SINGH AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Revision No. 1281 of 1910.

Limitation—Suit for possession within 12 years from date of mutation, but more than 12 years from date, defendant got possession—Punjab Limitation Act, I of 1900, article 2.

On 9th March 1908 plaintiff, as heir of his deceased father, sued defendants for possession of certain land of his father's in their possession.

⁽¹⁾ (1895) A. C. 517.

⁽²⁾ 4 P. D. C. 4. 1.

Defendants pleaded that the plaintiff's father had mortgaged the land by deed, dated 18th June 1893, and that the mortgagee had sold his rights to them on the 25th January 1898. There had been no mutation in respect of the mortgage except one after the sale attested on the 18th August 1898, although the mortgagee and defendants had been in possession since 1893.

Held, that as there had been a mutation of names attested within 12 years of suit, the suit was not barred by article 2 of the Punjab Limitation Act, I of 1900, notwithstanding the long possession of the mortgagee.

Petition under section 70 (b) of Act XVIII of 1884, for revision of the order of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 18th February, 1909.

Fazl Elahi, for petitioner.

Gulla Ram, for respondents.

The judgment of the learned Judge was as follows :—

7th April 1911.

RATTIGAN, J.—Plaintiff, Fazla, is a minor aged 6 years. He sues, through his next friend, for possession of certain land on the allegations that the said land is his ancestral property; that his father Rohela died about 2 years prior to the institution of this suit; that defendants Nos. 1—3 thereafter took possession of the said land under the pretence that they were mortgagees thereof; that no such mortgage exists in their favour, and that in any event, any such mortgage was invalid as being neither for consideration nor for necessity. Plaintiff therefore claims to recover possession of the land and denies that defendants have any rights in respect of it.

The suit was instituted on the 9th March 1908. Defendants Nos. 1—3 plead that the land in suit was mortgaged by the deceased, Rohela, to one Tek Singh, by duly registered deed, on the 16th June 1893, for Rs. 300; that subsequently Tek Singh sold his mortgage rights to their father, Dewa Singh, by deed of sale, dated 25th January 1898 for Rs. 346; that in the deed of mortgage executed by Rohela the period for redemption was fixed at 40 years; that plaintiff's next friend, Natha Singh, was incompetent to sue on plaintiff's behalf as plaintiff's mother was still alive; that the present suit was time-barred, that as plaintiff was not alive when the mortgage was effected, he was incompetent to sue; that there was consideration and necessity for the mortgage; and that the suit was premature as the period of 40 years had not elapsed. The *Munsif*, 3rd Class, dismissed plaintiff's suit on the ground, (1) that Natha Singh had no right to act as plaintiff's next friend in the presence of plaintiff's own mother;

(2) that plaintiff had no right to redeem until the period of 40 years had expired; (3) that the suit was time-barred.

Plaintiff's appeal to the Divisional Judge was also dismissed on the ground that his suit was *primâ facie* time-barred under Art. 2 of the schedule to the Punjab (Alienation of Ancestral Land) Limitation Act, 1900.

The learned Judge holds that as the plaintiff was born after the said Act came into force and had no vested right to sue under the old law, and as the mortgage impugned was that executed in 1893, and was with possession, the present claim was time-barred as aforesaid. Plaintiff preferred a petition for revision of this decree and his petition was duly admitted to a hearing. I have now heard arguments on the points of law involved and proceed to give my judgment in the case.

From the plaint and pleadings it is, I think, quite clear that the present suit cannot be regarded as one for redemption of the mortgage of 1893. On the contrary plaintiff flatly denies that his father, Rohela, ever executed any such mortgage. He further pleads no doubt, that if any such mortgage was executed, it was a transaction not binding on him, as it was without consideration or necessity. The lower Courts have unfortunately quite ignored plaintiff's primary plea and have made no inquiry into the question whether or not the mortgage set up by defendants was in fact effected by Rohela. They have in their judgments *assumed* it was. But in view of plaintiff's allegations and in view of the fact that he is admittedly the owner of the land, it was incumbent on defendants, who pleaded the mortgage to establish that fact. If no such mortgage was ever effected by Rohela, plaintiff's suit cannot in any event be held to be barred under Art. 2 of the schedule to the Punjab Limitation Act, 1900, which pre-supposes that there has been an actual alienation of the land. Defendants do not contend that they have had adverse possession for 12 years and over, and the consequence must be that plaintiff's suit it is not time-barred unless the alienation in fact took place. Plaintiff still maintains that there was no such mortgage and in justice to him, I think the Courts must decide the question after framing a proper issue thereupon.

There is a further point which the Courts seem to have overlooked. It is admitted that Tek Singh, the original mortgagee, never obtained mutation of names, but it appears

that on the 18th August 1898, Dewa Singh (to whom the mortgage rights were sold by Tek Singh) had mutation effected in his favour. The present suit is against the representatives of Dewa Singh, and it is with reference to the latter that we have to see whether the claim is time-barred. The Divisional Judge refers to this mutation entry, but apparently thinks it of no importance in view of the fact that Dewa Singh and Tek Singh had enjoyed possession of the land for years previously. But under the provisions of the Act, the Court before deciding whether a suit is barred, has to look, in any case in which at the time of the alienation possession is given or agreed to be given, *first* to the date (if any) on which the alienation was attested by the Revenue officer in the register of mutations maintained under the Punjab Land Revenue Act, 1887, and only in the *second place* and in the *absence* of any such attestation, to the date on which the alienee takes physical possession of the land alienated. The result of this provision is (as I understand the law) that a suit, which would fall under Art. 2 of the schedule, is in time, if brought within 12 years from the date of such attestation, and this too though such attestation actually took place more than 12 years after the alienee had taken physical possession of the land. When, therefore, a suit for possession is brought by the heir of the alienor, the Court must in the first instance see whether the alienation has been attested before a Revenue officer. If it has, the Court must then look to the date of such attestation, and if it finds that the suit has been instituted within 12 years of that date, it must hold the claim to be within time. It is only in those cases, when there has been (up to date of suit) no attestation before the Revenue officer, that the Court has to consider whether the suit has been brought within 12 years of the date when the alienee took physical possession of the land. Limitation Acts are to be strictly construed, and this appears to me to be the literal interpretation to be put upon the provisions of the schedule to the Punjab Act of 1900. Upon this construction, it is clear, that plaintiff's suit, which was instituted in March 1908, is within 12 years from the date when Dewa Singh obtained mutation of names in August 1898. The mere fact that Tek Singh and Dewa Singh had for many years previously been in physical possession of the land could not in the circumstance render the plaintiff's suit time-barred under Art. 2 of the schedule to the said Act. In the present case the original mortgagee seems never to have obtained mutation

of names, but as his transferee did have the mortgage duly attested, I do not think that the omission of the former to effect mutation in any way affects plaintiff's rights. To my mind it is immaterial whether mutation was effected by Tek Singh, the original mortgagee, or by Dewa Singh, the transferee of Tek Singh's rights. In either case plaintiff's suit would be in time if instituted (as it was) within 12 years from the date of such mutation. For these reasons I hold that the Divisional Judge was in error in holding that plaintiff's suit was *prima facie* barred by the provisions of Art. 2 of the schedule to the Punjab Limitation (Alienation of Ancestral Land) Act, 1900, and I therefore accept this petition and remand the case to the lower Appellate Court for determination of the appeal.

The Divisional Judge will now have to decide whether Rohela did execute a mortgage in favour of Tek Singh, and if so whether it is valid and binding upon the plaintiff.

Revision accepted.

No. 49.

Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon. Mr. Justice Shah Din.

KHAIRA, &c.—(PLAINTIFFS)—APPELLANTS,

Versus

MOULA, &c.—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 201 of 1910.

Mortgage—only in part for necessity—mortgagee not entitled to possession of fraction of mortgaged property.

The mortgagees of one Mussammat Akki sued the defendant-reversioners of this widow for possession of the mortgaged land. It was found that Rs. 228 out of Rs. 1,000 mortgage money was not for necessity.

Held, that a reversioner against whom part only of the mortgage consideration is binding, is in the position of a mortgagor to whom part only of the consideration has passed and he can resist, on the ground of partial absence of consideration, the mortgagee's suit for possession.

Held, therefore, that the mortgagees in this suit were not entitled to possession of a fraction of the property mortgaged in proportion to the amount of mortgage money found to have been for necessity.

Further Appeal from the decree of M. L. Waring, Esquire, Divisional Judge, Jullundur Division, dated 1st November 1909.

Sheo Narain, for appellants.

Beni Parshad, for respondents.

The judgment of the Court was delivered by—

26th June 1911.

SIR ARTHUR REID, C. J.—The question for decision is whether the mortgagee is entitled to possession of a fraction of the property mortgaged, in proportion to amount of mortgage money found to have been for necessity.

The mortgage was by a widow, and we concur in the concurrent findings below that of the Rs. 1,000 mortgage consideration the sum of Rs. 228 was not for necessity.

The learned pleader for the plaintiff-appellants contended that inasmuch as the whole consideration passed to the mortgagor, the contract was fully executed by the mortgagees and that the principle on which a mortgagee is not entitled to possession until the whole mortgage consideration has passed, viz., that he has not executed his part of the contract, is inapplicable.

This contention has, in our opinion, no force.

A reversioner against whom part only of the mortgage consideration is binding is in the position of a mortgagor to whom part only of the consideration has passed and can resist on the ground of partial absence of consideration, the mortgagee's suit for possession.

He is affected by so much only of the consideration as was for necessity and is not affected by the fact that the balance of the consideration, not for necessity, passed to the widow mortgagor, and he must be treated as a party to a contract which has not been completed by the other party.

An unpublished ruling of a Division Bench of this Court in Civil Appeal No. 1040 of 1903, cited for the appellants, is not in point, the Court having held that a mortgagee who had failed to prove, that the full consideration for a mortgage by a widow was for necessity, was entitled to possession, as mortgagee for the amount advanced to the husband, of land previously mortgaged by the husband of the widow, such prior mortgage having been part of the consideration of the mortgage by the widow.

Here there was no prior mortgage, and in the case cited, the Division Bench did not lay down any rule which can be held to help the appellant.

We have no hesitation in holding that the appellants are not entitled to possession of any part of the land mortgaged by the widow.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 50.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Chevis.

FAIZ AHMAD, &c.—(DEFENDANTS)—APPELLANTS,

Versus

BADAR DIN, &c.—(PLAINTIFFS)—RESPONDENTS,

Civil Appeal No. 1063 of 1910.

Appeal from order of remand under order XLI, rule 23, Civil Procedure Code, 1908—section 105 and order XLIII, rule 1 (u)—Punjab Courts Act, XVIII of 1884, section 40.

There were 3 appeals before the Chief Court against orders of remand by the Divisional Judge under order XLI, rule 23, Civil Procedure Code, 1908, viz.—

- (1) in a land suit of jurisdictional value of Rs. 707-2-0 ;
- (2) in a pre-emption case of jurisdictional value (i. e. 30 times jama) of Rs. 406-10-6 ;
- (3) in a small cause suit, value Rs. 1,170.

In all these three cases a further appeal would lie to the Chief Court under section 40 of the Punjab Courts Act, if the Divisional Judge's decree varied or reversed, otherwise than as to costs, the decree of the Court below and not otherwise.

Held, that as it was impossible to say whether the decree which might have been passed by the Divisional Judge, had he not remanded the case, would have "varied or reversed otherwise than as to costs," the decree of the Court below and whether a further appeal would lie or not from the Divisional Judge's decree, no appeal lay under order XLIII, rule 1 (u) of the Civil Procedure Code, against the orders of remand in these three cases.

Appeal from the order of Major B. O. Roe, Divisional Judge, Amritsar Division, dated the 23rd August 1910.

Sukh Dial, for appellants.

Nand Lal, for respondents.

The judgment of the Court was delivered by—

CHEVIS, J.—This judgment will cover appeals Nos. 543 of 27th June 1911. 1909 and 148 of 1911.

This appeal is a land suit, the jurisdictional value of which is Rs. 707-2-0. The first Court dismissed the suit holding it to be time-barred ; the learned Divisional Judge on appeal held that the suit was within time and remanded it under order XLI, rule 23.

Appeal No. 543 is a pre-emption suit. Here the value, taken at 30 times the jama, is Rs. 406-10-6. The first Court dismissed the suit, but the Divisional Judge has remanded the case under order XLI, rule 23.

Civil Appeal 148 of 1911 is a small cause suit, value Rs. 1,170, dismissed by the first Court, but remanded by the Divisional Judge under order XLI, rule 23.

In all three cases an appeal has been preferred to this Court against the order of remand.

The question for decision in all three cases is whether an appeal lies from the order of remand.

Section 105 of the Civil Procedure Code lays down that save as otherwise *expressly* provided no appeal shall be from any order made by a Court in the exercise of its original or appellate jurisdiction.

Order XLIII shows what orders are appealable, and amongst the orders there specified we find "an order under rule 23, "order XLI remanding a case where an appeal would lie from "the decree of the Appellate Court."

This, in our opinion, can have only one possible meaning, *viz.*, that the order of remand is appealable only in cases in which the decree, which would have been passed by the Appellate Court, had that Court, instead of remanding the case under order XLI, rule 23, decided the whole suit and passed a decree, is appealable. So in each of the three cases before us the question is, if the Divisional Judge had not remanded the suit but had decided the whole case and passed a decree would a further appeal have lain from his decree? In order to decide this question we must look to section 40 of the Punjab Courts Act, which is the law providing for further appeals from appellate decrees of a Divisional Judge. This section shows us that in each of the cases before us a further appeal would lie if the Divisional Judge's decree varied or reversed otherwise than as to costs, the decree of the Court below, and not otherwise. Now it is impossible to say if the decree which might have been passed by the Divisional Judge, had he not remanded the case under order XLI, rule 23, would have varied or reversed otherwise than as to costs the decree of the Court below, and therefore it is impossible to say whether a further appeal would lie or not from the Divisional Judge's decree.

It is argued before us that in case of doubt we should give the benefit of the doubt to the appellant, but we are unable to agree with this argument. As already pointed out, section 105 of the Code lays down that, except as expressly provided, orders passed by Civil Courts are not appealable, and in a case where it is impossible to say whether the order is appealable or not,

we must hold that no express provision for appeal has been made and that the order is not appealable. We must, therefore, hold that no further appeal is provided for by law in these cases.

In the present appeal we are asked to interfere on revision, but for the reasons laid down in 101 *P. R.*, 1910 ⁽¹⁾, we consider that this Court should not interfere on the revisional side in such cases.

The appeals fail and are dismissed on the ground that no appeal lies, but as the point is a novel one, we pass no order as to costs in this Court.

Appeals rejected.

No. 51.

Before Hon. Mr Justice Shah Din.

MUSSAMMAT BASANTI—(DEFENDANT)—APPELLANT,

Versus

PARLAPA AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 936 of 1909.

Custom—Widow's estate—forfeiture of, on marrying deceased husband's brother—Sikh Jats, mauza Butaheri, tahsil and district Ludhiana—Riwaj-i-am.

Held, that among Sikh Jats of mauza Butaheri, tahsil and district of Ludhiana a widow does not forfeit her life estate in her deceased husband's property on marrying her husband's brother.

Further appeal from the decree of H. A. Rose, Esquire, I.C.S., Divisional Judge, Ambala Division, dated the 20th March 1909.

Obedulla, for appellant.

Harris, for respondents.

The judgment of the learned Judge was as follows:—

SHAH DIN, J.—The parties in this case are Sikh Jats of Mauza Butaheri, tahsil and district Ludhiana, and the question for decision is whether among them a widow on her re-marriage with her deceased husband's brother does not forfeit her life estate in her first husband's property.

13th May 1911.

The facts are very fully stated in the judgments of the Courts below.

(1) 101 *P. R.* 1910 (*Ali Baksh v. Chuhan Singh*).

The Court of first instance has held that by custom applicable to the parties the widow does not forfeit her life estate by reason of her re-marriage with her deceased husband's brother while the lower Appellate Court has held that such re-marriage works a forfeiture.

In a case of this kind the question of the allocation of the burden of proof is a matter of some difficulty, but assuming that the *onus* lay upon the widow in this case of proving that her re-marriage in the *karewa* form with the brother of her deceased husband did not by custom cause a forfeiture of her life interest in her first husband's property, she has, in my opinion, discharged that *onus*.

The leading authority on the question under consideration is No. 115, *P. R.* 1900, (1), in which, after a very full discussion of the matter, it was held by Mr. Justice Chatterjee that among the Sikh Jats in the Ferozepore district a widow by marrying her deceased husband's brother does not forfeit, by custom, her life estate in her former husband's property. The following observations made by the learned Judge in the course of his judgment contain a lucid exposition of the principles on which the custom in question is based ;—

“ The decision of the question is not free from difficulty, but on the whole I am disposed to think that the plaintiffs' claim ought not to succeed. Having regard to the customs and notions of the Jats, I am inclined to hold that there is a substantial distinction recognized by them between the marriage of a widow with her husband's brother and her marriage with a stranger. The Jat notion undoubtedly is that by marrying a member of a family a woman not only becomes a member of it but comes to be looked upon as if she were the property of the family. If her husband dies, his male relations in the order of propinquity to him have a preferential claim to take her to wife. In practice in most instances she follows this rule if she contracts a second marriage at all. Where she takes the liberty of choosing a husband elsewhere, it is usual for the next relative of the deceased to institute a Criminal prosecution under section 498, Indian Penal Code, or sue for her custody on the allegation that a *karewa* has actually taken place with him, such proceedings fail because our Courts refuse to recognize the mere sentimental claims of the male relation as binding on the woman without proof

“ of an actual marriage whether by ceremonies or a distinct
“ declaration or continued cohabitation in the avowed character
“ of husband and wife.”

“ Among Jats also no ceremonies are essential to a widow's
“ re-marriage but this is more specially the case where the
“ second husband is the brother of the first. By mere cohabita-
“ tion the widow assumes the position of his wife and
“ he of her husband. (See remarks in *Hira Singh v. Mus-*
“ *samat Rami* (1) at page 318). This must be due to
“ the universal opinion held by Jats that in marrying her
“ husband's brother the widow is doing the right and proper
“ thing and what she is expected to do. It is allowable, then,
“ to infer that as regards forfeiture there would be some differ-
“ entiation between the consequences of an act of this nature
“ and those of a *karewa* out of the family. The estate of the
“ widow is only for life, and is primarily given to her by way
“ of maintenance. She gets this as a member of the family
“ and loses it if she leaves the family for another. Would she
“ be subjected to the same penalty if she continues a member
“ of the family as before in spite of her re-marriage? Probably
“ custom, which is founded on the good sense of the people and
“ the notions of natural justice and equity prevalent among
“ them, would prevent the second husband, if he is the sole
“ brother of the deceased, from saying to his brother's widow
“ you have done what is regarded as the proper thing amongst
“ us by marrying me. I now call upon you to surrender
“ your first husband's property as the penal consequence of
“ that act? If there are more brothers than one, the case of
“ those who do not marry the widow is but little stronger than
“ that of him who does marry her. I should be prepared from
“ these considerations to prefer the evidence in support of the
“ contention that such a marriage does not involve loss of the
“ first husband's estate.”

The learned Judge then proceeds to discuss the published decisions of this Court bearing on the point. He says:—

“ The custom, however, does not rest on mere specula-
“ tion. There is plenty of authority in support of the
“ position that among Sikh Jats the widow of a man
“ marrying his brother by *karewa* does not ordinarily
“ forfeit his estate. *Parema v. Mussamat Pardhan* (2) has already

(1) 74 P. R. 1893, (*Hira Singh v. Mussamat Rami*).

(2) 137 P. R. 1883 (*Parema v. Mussamat Pardhan*).

“been mentioned in *Punjab Singh v. Mussammat Chandi* (1).
 “These cases fairly establish the existence of the custom
 “among the Sikh Jats of Sirsa. A similar custom was found to
 “prevail in Rohtak, Civil Appeal No. 1211 of 1876. In
 “*Mussammat Lachmi v. Harjas* (2) and *Sita and others v.*
 “*Khuba* (3) a contrary custom was found, but the former case
 “related to Rors of Karnal, while in the latter the second
 “husband was not a brother but a cousin. In *Hira Singh and*
 “*others v. Mussammat Rami* (4), which was a case among Hinjra
 “Jats of Amritsar, the Divisional Judge held that the
 “widow did not forfeit her right by cohabiting with her
 “first husband’s brother which did not amount to marriage,
 “and the case was remanded for a further inquiry into custom
 “by Sir Meredyth Plowden after reviewing the existing
 “authorities. The substance of his remark is, on the whole,
 “favourable to the existence of such a custom, though perhaps
 “the headnote goes further in this respect than his words
 “justify. One of the plaintiffs’ own witnesses in that case de-
 “posed that the widow loses her first husband’s estate if she
 “leaves his home, and said that in that instance the widow
 “had not done so. The case was ultimately compromised by the
 “other brothers of the deceased husband, who were plaintiffs,
 “paying the widow Rs. 400 in consideration of her relin-
 “quishing the estate. This case therefore is, on the whole,
 “favourable to the widow’s retention of her first husband’s
 “estate in spite of *karewa* with his brother, and shows that
 “this custom is widespread among Jats, and is not confined
 “to the Sirsa district. The remarks of Mr. Justice Barkley
 “in *Parema v. Mussammat Pardhan* (5) are also indicative
 “of the custom being known to officers of large judicial
 “experience and possessing intimate knowledge of the
 “people. The most accurate statement regarding forfeiture on
 “re-marriage is given by Sir Charles Roe, in his *Tribal Law*,
 “page 60. Marriage with a brother or next agnate is treated by
 “him as a thing apart from marriage with a stranger. The
 “custom on the latter point is of no real help in deciding the
 “custom as regards the former.”

I entirely agree with Mr. Justice Chatterjee that the Sikh
 Jats in this province regard with full approval the re-marriage

(1) 88 P. R. 1900 (*Punjab Singh v. Mussammat Chandi*).

(2) 123 P. R. 1884 (*Mussammat Lachmi v. Harjas*).

(3) 53 P. R. 1896 (*Sita v. Khuba*).

(4) 74 P. R. 1893 (*Hira Singh v. Mussammat Rami*).

(5) 137 P. R. 1883 (*Parema v. Mussammat Pardhan*).

of a widow with her deceased husband's brother, and that as, in spite of such remarriage the widow remains a member of the family of her first husband, public opinion among Jats, as expressed in the rules of custom, does not insist upon the widow surrendering her life estate in her first husband's property either in favour of her second husband or, if the deceased has left more than one brother, in favour of the other brother or brothers of her second husband. The instances cited by the parties in the present case also support this view. The plaintiffs' witnesses gave altogether three instances, in which, according to them, the widow on her remarriage with her deceased husband's brother forfeited her life estate. Of these, however, two instances, as pointed out by the first Court, have not been proved; and there is therefore only one instance in plaintiffs' favour, namely, that of Mussammat Paremon, widow of Daya Singh, who remarried Daya Singh's younger brother, Chatra, and in consequence of that remarriage forfeited her life estate in Daya Singh's land, which was thereafter partitioned among the three surviving brothers of Daya Singh. On the other hand, four instances have been cited on behalf of the defendant to shew that among Sikh Jats the remarriage of a widow with her deceased husband's brother does not work a forfeiture of her life estate. The Divisional Judge has discarded three of these instances on the ground that they "relate to cases in which the deceased husband of the widow left only one brother who espoused his widow and allowed his land to remain in her name." The learned Judge says, "it is self evident that such instances prove nothing." I do not see my way to agree in this view. As pointed out by Chatterjee, J. in the above mentioned decision, "If there are more brothers than one, the case of those who do not marry the widow is but little stronger than that of him who does marry her," inasmuch as the widow on her remarriage with the sole surviving brother, or with one of the brothers, of her deceased husband does not cease to be a member of the latter's family, her second husband taking the place of the first; and she does not therefore incur the penalty of forfeiting her life estate as a widow which she would necessarily incur if she were to remarry outside the family. In this latter respect Jat custom appears to be very strict, so much so that, according to it, there is, as pointed out in No. 88 P. R. 1900, (1) a considerable difference between remarriage with the deceased husband's brother and remarriage with a near relative of the deceased husband.

(1) 88 P. R. 1900 (*Punjab Singh v. Mussammat Chandi*).

As soon as the widow steps out of the family circle, represented by the joint family of her deceased husband, other considerations come into play; and then, although her remarriage may be with a near collateral of her deceased husband, she must surrender her life estate to the latter's own brothers. In my opinion, therefore, the Divisional Judge was in error in leaving out of account the three instances referred to above; they are nearly as good evidence of the prevalence of the custom contended for by the widow as if the deceased husband of the widow in each of those cases had left more than one brother. The fourth instance cited for the defendant is admittedly in point. Uttam Singh, Bhana, Mahla and Kehru were four brothers. Uttam Singh died, leaving a widow, Mussammat Harnami, who contracted a *karewa* marriage with Mahla and in spite of her remarriage she retained possession of Uttam Singh's land during her life-time. It was not until after her death that it was partitioned among the three surviving brothers of Uttam Singh.

I think that these four instances, taken in conjunction with the decisions of this Court in Nos. 88 and 115 *P. R.* 1900, ⁽¹⁾ ⁽²⁾ are sufficient to prove that among the parties' tribe a widow does not forfeit her life interest in her deceased husband's property by reason of her remarriage with the latter's brother.

In support of his view the Divisional Judge relies also on the answer to question 42 in the Customary Law of the Ludhiana District (1885), page 59. There the rule of custom is stated in the following terms:—

“All tribes agree that unchastity and remarriage (whether in the family or to a stranger *apparently*) equally destroy the right of the widow over her husband's estate; some say that mere unchastity has not this effect, if the woman does not actually leave her husband's home.....
 “.....Remarriage to a *stranger* would in all cases, *I think*, deprive the widow of her right; and so would a union with a member of her deceased husband's family.”

The above is only a faint expression of opinion by the learned Compiler of the volume of the Customary Law in question; and it cannot, therefore, have the same weight as would attach to an unequivocal statement of a rule of custom made by those concerned and supported by some definite instances of the actual operation of the rule. It would appear from the language used by the Compiler (see the words underlined by me) that the question of the forfeiture of the widow's life estate in the

⁽¹⁾ 88 *P. R.* 1900 (*Punjab Singh v. Mussammat Chandi*).

⁽²⁾ 115 *P. R.* 1900 (*Mussammat Indi v. Bhanga Singh*).

event of her marrying her deceased husband's own brother by *karewa* was not definitely put before the tribes concerned, and they had therefore no opportunity of stating what their custom was on that point.

For the foregoing reasons, I hold that the defendant has not forfeited her life estate in the property of Kehru by reason of her remarriage in *karewa* form with Sheru, brother of the deceased. I therefore accept this appeal and reversing the decree of the Divisional Judge, restore that of the first Court with costs throughout.

Appeal accepted.

No. 52.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shah Din.

KISHOR CHAND AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

GURAN DITTA MAL—(DEFENDANT)—RESPONDENT.

First Appeal No. 210 of 1909.

Interest—Hundis silent as to interest—separate oral agreement inadmissible—Evidence Act, I of 1872, section 92—Negotiable Instruments Act, XXVI of 1881, section 80.

Plaintiffs sued defendant for the recovery of the principal amounts due upon several *hundis* together with interest due thereon at the rate of Re. 1-4-0 per cent. per mensem, alleging that although the instruments were silent as to interest the latter was recoverable under a separate *oral* agreement.

Held, that evidence as to the separate *oral* agreement was inadmissible under section 92 of the Evidence Act, proviso 2 to the section not being applicable to the case, and that interest could only be allowed at the rate of Rs. 6 per cent. *per annum* under section 80 of the Negotiable Instruments Act.

First Appeal from the decree of W. A. Harris, Esquire, District Judge, Ferozepore, dated the 19th November 1908.

Beni Pershad, for appellants.

Sangam Lal, for respondent.

The judgment of the Court was delivered by

SHAH DIN, J.—This is a suit brought by the plaintiffs-appellants, Kishor Chand and Kanshi Ram, against the defendant-respondent Gurditta Mal to recover Rs. 18,178-11-3, principal and interest, due on four *hundis* and a note of hand executed by the latter in favour of the former in September 1904. The consideration money entered in the *hundis* and the

6th May 1911.

note of hand in question was Rs. 11,250, and the amount sued for consisted of this sum and the sum of Rs. 6,928-11-3 alleged to be due by way of interest on the principal amount at the rate of Re. 1-4-0 *per cent per mensem*. The plaintiff's suit was resisted by the defendant on various grounds, which need not be noticed at this stage of the proceedings, except the plea that no interest was agreed upon between the parties, and that in any case the plaintiffs were not entitled to charge on the amount of the *hundis* interest at a higher rate than Rs. 6 *per cent. per annum* (pages 26 and 28 of the record). The plaintiffs in replication stated that interest at the rate of Re. 1-4-0 *per cent. per mensem* had been agreed upon and that they were entitled to charge interest at that rate upon the amount due both on the *hundis* and on the note of hand. Upon the pleadings of the parties eight issues were framed by the Lower Court, the seventh issue being what rate of interest ought to be allowed on the *hundis*? On this issue the Court found as follows :—

“The *hundis* are silent as to the rate of interest to be charged. Plaintiff No. 2 deposed that interest had always been charged by them at Re. 1-4-0 *per cent. per mensem* on previous *hundis*. This may have been so, but there is no proof that defendant had agreed to pay interest on the *hundis* sued on at Re. 1-4-0 *per cent. per mensem* I therefore only allow interest at Rs. 6 *per cent. per annum* under section 80 of the Negotiable Instruments Act.”

On the amount of the note of hand, *viz.* Rs. 1,250, the Court allowed interest at the rate of 12 *per cent. per annum*; and thus passed a decree in favour of the plaintiffs against the defendant for Rs. 14,440 which sum consists of Rs. 11,250 principal and Rs. 3,190 interest calculated at the above mentioned rates on the amounts due on the *hundis* and on the note of hand, respectively.

The defendant has accepted this decree, but the plaintiffs have appealed therefrom to this Court, and on their behalf it has been urged by their counsel that the Lower Court ought to have decreed interest on the amount sued for at the rate of Re. 1-4-0 *per cent. per mensem* which rate, it is contended, was agreed upon between the parties. With reference to the additional ground of appeal filed by the appellants' counsel it has further been urged that the Court below ought to have enquired into the existence of a usage of trade prevailing in the locality according to which *hundis* such as those sued upon do not contain the rate of interest, it being entered only in the books of the *sahukar* and the broker.

The *hundis* sued upon are admittedly silent as to interest. But the appellants' counsel has argued that interest at the rate of Re. 1-4-0 *per cent. per mensem* was agreed to be paid by the defendant on the principal amount of the *hundis*, and that as section 80 of the Negotiable Instruments Act, XXVI of 1881, applies only in cases in which no interest had been expressly agreed upon by the parties, the District Judge was in error in reducing the rate of interest from Re. 1-4-0 to annas 8 *per cent. per mensem*. In support of this contention the learned counsel has relied upon the decision of their Lordships of the Privy Council in *Ghanshani v. Ram Narain* (1). That was a suit brought on certain *hundis* which were silent as to interest but as to which there was a collateral written agreement that they should bear interest at 30 *per cent. per annum*, and it was found that this mode of dealing with interest by a collateral agreement, and not on the face of the *hundis*, was in accordance with the custom prevailing in the district and amongst the class affected by the suit. For the defendant it was contended in that suit, that, notwithstanding the agreement of the parties the plaintiff's right to interest was restricted to 6 *per cent. per annum* by section 80 of Act XXVI of 1881. Their Lordships held that interest was recoverable at the rate agreed upon by the parties, and that section 80 aforesaid was not applicable to the case.

"Section 80 of the Negotiable Instruments Act," observed their Lordships, "does not purport to deprive those dealing with "such instruments of the freedom of contract possessed by "other contracting parties. It purports to confer a right to "interest, not to take away such a right otherwise existing. "When a plaintiff has to rely upon the section as the ground "of his claim to interest no doubt the terms of the section "must be followed. But to read the section as depriving him "of a contractual right of interest would be to read into it "something which it does not say and which cannot reasonably "be implied from its language."

Relying on the above authority the appellants' counsel has urged that section 80 aforesaid would apply to the present case only in the absence of proof of an agreement between the parties to pay interest at a higher rate than Rs. 6 *per cent. per annum*, and his contention is that an agreement by the respondent to pay interest at the rate of Re. 1-4-0 *per cent. per mensem* must be held to have been proved by the statement

(1) (1907) I. L. R. 29 All. 3.⁰⁰

on oath made by the plaintiff appellant, Kanshi Ram, on this point and by the fact that this rate was charged in the account between the parties on the various *hundis* executed and renewed by the respondent from time to time, the last series of the *hundis* being those sued upon in this case. In this connection reference has been made to pages 7 to 15 (transliteration of the book account) and to pages 32 to 33 of the record. Conceding however, the truth of the appellant Kanshi Ram's statement and the correctness of the accounts produced by him, all that can be said to have been proved is that at the time of the execution of the *hundis* a separate *oral* agreement was made between the parties as to the rate of interest to be charged on the money advanced to the respondent and the question for consideration is whether having regard to the terms of section 92 of the Evidence Act the existence of this alleged contemporaneous *oral* agreement between the parties can be proved. The appellants' counsel has contended that section 92 of the Evidence Act does not apply to this case at all, and in support of his contention he again relies on the above-mentioned decision of their Lordships of the Privy Council, urging that so long as the fact of a separate agreement between the parties as to payment of interest is proved, no matter whether that agreement is in writing or not, it must be enforced according to its terms. In the Privy Council case, however, it will be observed, there was a collateral *written* agreement between the parties as to the rate of interest to be charged on the amount of the *hundis*, the *hundis* themselves being silent on the point.

The question therefore whether in that case the existence of the separate agreement as to interest could or could not be proved in view of section 92 of the Evidence Act did not arise, and the sole question for decision was whether or not the rate of interest agreed upon by the parties in the collateral written agreement could be allowed when the *hundis* themselves were silent as to interest. Their Lordships answered that question in the affirmative. Their decision, therefore, is an authority only in support of the position that section 80 of the Negotiable Instruments Act does not preclude the granting of a decree for interest in cases in which no rate of interest is specified in the *hundis* sued upon, but in which a valid contract apart from the *hundis* as to payment of interest exists between the parties.

The question whether in cases like the present the existence of a contemporaneous *oral* agreement as to interest can or

cannot be proved under section 92 of the Indian Evidence Act came up for decision before the Madras High Court in the case of *Fathima Bibi Ammal and others v. Hanumantha Row* ⁽¹⁾ and it was held by the learned Judges of that Court that where a promissory note is silent as to interest oral evidence is not admissible in proof of a contemporaneous agreement to pay a certain rate of interest but that in such cases interest at the rate of Rs. 6 per cent. should be awarded under section 80 of the Negotiable Instruments Act. We entirely agree with the learned Judges of the Madras High Court that in a case in which a suit is based on a Negotiable Instrument, which is a document of a formal character, the existence of a separate oral agreement as to any matter on which the instrument is silent cannot be proved under section 92 of the Evidence Act, proviso 2 to the section not being applicable to such a case. The instruments sued upon in the present case are *Shah Jag hundis* drawn with the utmost formality in a peculiarly technical language, and they cannot be cashed except through a respectable banker and we are quite clear that to these *hundis* proviso 2 to section 92 aforesaid does not apply. The concluding words of the proviso in question, *viz.*, "In considering whether "or not this proviso applies the Court shall have regard to "the degree of formality of the document," are very material and as we consider that the *hundis* with which we are dealing in this suit cannot but be regarded as documents of a very formal nature, the alleged oral agreement as to interest, on which the *hundis* are silent, is not saved by the 2nd proviso to section 92 of the Evidence Act. We hold, therefore, that even if the respondent entered into a separate oral agreement with the appellants to pay interest at the alleged rate of Re. 1-4-0 *per cent. per mensem* on the *hundis* executed by him in their favour that agreement cannot be proved by them and it follows that the *hundis* themselves being silent as to interest, we must fall back upon section 80 of the Negotiable Instruments Act, and under that section interest at the rate of 6 *per cent. per annum* only can be allowed to the appellants.

The additional ground of appeal does not in any way help the appellants for, conceding for the sake of argument that according to the usage of trade affecting the parties *hundis* such as those sued upon do not contain the rate of interest and that it is entered separately in the books of the *sahukar* and the broker, the alleged entry of the rate of interest in the books in ques-

(1) (1907) 17 *Mad. Law J.* 296.

tion would not of itself be sufficient evidence of a written agreement between the parties as to payment of interest at the rate of Re. 1-4-0 *per cent. per mensem*. At the best such entry would be a mere memorandum of an oral agreement between the parties as to payment of interest or as to rate of interest chargeable according to mercantile usage in such transactions. The appellants' counsel concluded his argument in reply to the respondent's pleader by a request that we should remand the case to enable his clients to prove a separate written agreement between them and the respondent as to interest by producing the broker through whom the loans in question were raised. We cannot see our way to accede to this request, as we think that it would be dangerous to allow the appellants now to produce fresh evidence on a point as to which they ought to have adduced the necessary proof in the lower Court before. The remand asked for would open the door to the production of false evidence, and we must therefore decline to grant the request. We note that the appellant's counsel has not addressed us as to the rate of interest that should have been allowed on the note of hand, Rs. 1,250 on which the lower Court has allowed interest at the rate of 12 *per cent. per annum*.

For the foregoing reasons we maintain the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

No. 53.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

SUNDAR DAS AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

SAJJAN SINGH AND OTHERS—(PLAINTIFFS AND DEFENDANTS)
—RESPONDENTS.

Civil Appeal (Mis.) No. 423 of 1909.

Pre-emption—lis pendens—resale of property to another pre-emptor during pendency of suit—rival pre-emptors sharing bargain—Punjab Pre-emption Act, section 14.

Held, where after the institution of a suit for pre-emption another pre-emptor asserted his right of pre-emption privately and the vendee, in recognition of his right transferred the property to him, that the doctrine of *lis pendens* did not apply to such transfer, and that the same would bar plaintiff's suit, unless plaintiff had superior rights of pre-emption to the transferee.

Held also, that section 14 of the Punjab Pre-emption Act had no application to such a case and that consequently the plaintiff was not entitled to share the property in suit with the transferee as a rival pre-emptor with equal rights of pre-emption.

Further appeal from the order of H. Scott-Smith, Esquire, Divisional Judge, Ferozepore Division, dated the 15th February 1909.

Tek Chand, for appellants.

Govind Das, for Sajjan Singh, respondent.

The judgment of the Court was delivered by

SHAH DIN, J.—The facts of this case are briefly these:— 5th May 1911.
The land in suit consists of two plots—(1) 41 *kanals* 1 *marla* of land comprised in *khewat* No. 471, *khassra* Nos. 4586, 4587 and 4609, and (2) 58 *kanals* 15 *marlas* of land being $\frac{3}{10}$ ths of 195 *kanals* 19 *marlas* comprised in *khewat* Nos. 472-476. *Khewat* No. 471 also includes *khassra* No. 1225, consisting of 48 *kanals* 8 *marlas* of land, which is not in dispute.

The land in suit originally belonged to Sunder Singh and Thumri, sons of Ram Singh defendants Nos. 3 and 4, who sold it to Sunder Singh, son of Maluk Singh, defendant No. 1, on the 12th June 1906. On the 17th June 1907, defendant No. 1 sold this land to Harnam Singh, defendant No. 2, for Rs. 2,000. The plaintiff, Sajjan Singh, instituted the suit for pre-emption, out of which the present appeal has arisen, on the 9th June 1908. On the 10th June 1908, defendants Nos. 3 and 4 sent a registered notice to defendant No. 2, Harnam Singh, stating that they had a right of pre-emption in respect of the land which he had purchased from Sunder Singh and threatening him with a suit if he did not give up the land to them. On the 11th June 1908 Harnam Singh sold the land to defendants Nos. 3 and 4 in recognition of their right of pre-emption. On the 2nd July 1908, on which Sajjan Singh's suit was fixed for hearing, Sunder Singh and Thumri were impleaded as defendants by order of Court, and they put in their pleas on the 29th July, urging that the plaintiff's right of pre-emption was not superior to theirs and that as against them his suit should be dismissed. In replication it was urged by the plaintiff, *inter alia*, that the re-sale in favour of defendants Nos. 3 and 4 by the original vendee, Harnam Singh, having been made *pendente lite* was invalid and could not affect his right of pre-emption. He did not, however, dispute that the right of pre-emption of

defendants Nos 3 and 4 was equal to his. The first Court framed several issues, of which the second and third issues, which only need be noticed at this stage of the case, were :—

(2) Whether the re-sale in favour of defendants Sunder Singh and Thumri was not binding on the plaintiff and was bad by reason of having been made *pendente lite* ; and

(3) Whether the re-sale in question was a *bonâ fide* transaction * * * * *

On these issues, the Court held that the re-sale by the first vendee in favour of Sunder Singh and Thumri was a *bonâ fide* transaction, and that upon the principle laid down in No. 26 P. R. 1908 (1) the doctrine of *lis pendens* did not apply to the said re-sale. The Court further held that as the plaintiff had failed to prove that his right of pre-emption was superior to that of defendants Nos. 3 and 4, his suit could not succeed against them, and it therefore dismissed the suit.

On appeal, the Divisional Judge agreed with the first Court in holding that the re-sale to defendants Nos. 3 and 4 was a *bonâ fide* transaction, and that the rule of *lis pendens* did not apply to it, because, in the language of the learned Judge, “defendants Nos. 3 and 4 having asserted their pre-existing right by the purchase of the 11th June 1908, are in as good a position as if they had brought a suit for pre-emption.” The Divisional Judge, however, held further that defendants Nos. 3 and 4 “must in fact be classed as rival pre-emptors equally entitled with plaintiff within the meaning of section 14 of the Punjab Pre-emption Act,” and he therefore remanded the case under Order XLI, rule 23, Civil Procedure Code with a direction to the first Court to decide what share the plaintiff was entitled to in the land in dispute, and also as to whether the price mentioned in the second deed of sale had been paid or fixed in good faith.

From that order of remand defendants Nos. 3 and 4 have preferred an appeal to this Court and we have heard full arguments on both sides on the main questions involved in the case. Those questions are (1) whether the re-sale by the original vendee in favour of defendants Nos. 3 and 4 was bad in law by reason of its having been made *pendente lite* ; and (2) if the rule of *lis pendens* did not apply to the re-sale in question and it was not therefore invalid, whether the plaintiff having an equal right of pre-emption with defendants Nos. 3 and 4 was

(1) 26 P. R. 1908 (*Mahmud Khan v. Khuda Bakhsh*).

entitled to share in the land in dispute under section 14 of the Punjab Pre-emption Act.

Upon the first question we think that the view taken by the Courts below is correct, namely, that since the re-sale in favour of defendants Nos. 3 and 4 was made by Harnam Singh in recognition of their pre-existing right of pre-emption which was admittedly superior to him, the mere fact, that that re sale was made after the plaintiff had brought his suit for pre-emption against Harnam Singh to enforce his own right of pre-emption, was not of itself sufficient to vitiate the said re-sale as one opposed to the doctrine of *lis pendens*. In support of his position that the rule of *lis pendens* applied to the re-sale by Harnam Singh, the plaintiff's pleader has relied on the decision of the Allahabad High Court in *Ghasitey v. Gobind Das* (1) of which the head note runs as follows :—

“After the filing of a suit for pre-emption but before services of summons on the defendants, the defendant-vendee re-sold the property claimed to a second vendee who had equal rights as a co-sharer with the plaintiff. This second vendee was added by the Court as a party defendant, but the plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. Held, that the doctrine of *lis pendens* applied and the plaintiff was entitled to a decree.”

This ruling is no doubt in favour of the plaintiff, but as it is opposed to the principle laid down in the decisions of our own Court in No 26 P. R. 1908 (2) and No. 7 P. R. 1910 (3), and as we concur in the view adopted in the two last mentioned cases, we must, with all due respect to the learned Judges of the Allahabad High Court, decline to follow their ruling. In the Allahabad case the position of a person entitled to a right of pre-emption in respect of a particular sale who asserts that right privately and in recognition of whose right the original vendee re-sells the subject of sale to him, has not been kept in view; and it has been assumed that the second vendee had acquired rights in the property sold simply and solely by reason of the resale in his favour, thus deriving title under the first vendee by the alienation made by the latter pending the suit. In our opinion, this is an erroneous view of the legal position of a pre-emptor who successfully enforces his right of pre-emption against the original vendee by obtaining a resale privately in his favour, the correct view being the one which is

(1) (1908) I, L. R. 30 All. 467.

(2) 26 P. R. 1908 (*Mahmud Khan v. Khuda Bakhsh*).

(3) 7 P. R. 1910 (*Muhammad Khan v. Sardar*).

fully explained in No. 26 P. R. 1908. The following extracts from the judgment of the Division Bench in that case have a direct bearing on the point before us :—

“ Put broadly and briefly the doctrine of *lis pendens* forbids
 “ creation of new rights, over property already the subject of
 “ suit, *pendente lite* which are calculated to injure the rights
 “ of the claimant. It does not, and if we consider for a
 “ moment we see that it could not, apply to the assertion of
 “ rights which existed prior to the institution of the pending
 “ suit.” * * * *

“ No doubt he (the second vendee) gets no further rights
 “ as against the respondent (pre-emptor) by the deed of sale
 “ *per se*, but he can maintain that sale if he can prove a
 “ pre-existent right to have it executed in his favour. So far
 “ does the doctrine of *lis pendens* apply that the sale could
 “ create no new right in his favour having its birth subsequent
 “ to the suits of the respondent, but obviously he is not debarred
 “ from asserting any pre-existent right he may have had
 “ against the vendor and the vendee by the mere fact that
 “ some one else had brought a claim against them in reference
 “ to the same property.” * * *

“ In claims for pre-emption the right of any particular
 “ claimant is not prejudiced *qua* his own right, by the asser-
 “ tion by another claimant of his own pre-existing rights.” *

“ No doubt the sale to the appellant, Mahmud Khan
 “ (the second vendee), would be useless to him if that were
 “ the basis of his title, but here his title to pre-empt was exis-
 “ tent prior to the suit and is independent both of it and of
 “ the subsequent sale which was only executed in recognition
 “ of the assertion of his right.” * * *

The plaintiff's pleader has tried to distinguish No. 26 P. R. 1908 (1) from *Ghasitey v. Gobind Das* (2) and from the present case, on the ground that whereas in the first mentioned case the pre-emptive right of the second vendee (Mahmud Khan) was held to be *superior* to those of the pre-emptors (Amir Bakhsh and Khuda Bakhsh) who had brought separate suits for pre-emption against the original vendee, in the Allahabad case, as also in the present case, the right of pre-emption of the second vendee was only *equal* to that of the plaintiff pre-emptor. In our opinion, this distinction is immaterial and the *ratio decidendi* in 26 P. R. 1908 (1) applies as well to a

(1) 26 P. R. 1908 (*Mahmud Khan v. Khuda Bakhsh*).

(2) (1908) I. L. R. 30 All. 467.

case in which the pre-emptive right of the second vendee, claiming under a private resale to himself, is equal to that of the pre-emptor who enforces his right by suit as to a case in which the former's right of pre-emption is superior to that of the latter. In fact, in No. 7 P. R. 1910 ⁽¹⁾ which is a sequel to No. 26 P. R. 1908, ⁽²⁾ the pre-emptive right of the second vendee, Mahmud Khan, was found to be *equal* to that of Amir Bakhsh and not superior to it. The observations made in 26 P. R. 1908 ⁽²⁾ regarding the alleged superior right of Mahmud Khan to those of Amir Bakhsh and Khuda Bakhsh clearly did not constitute the real foundation of the decision that the doctrine of *lis pendens* did not apply to the resale in favour of Mahmud Khan, and on further enquiry during the subsequent stages of the case, it was discovered that Mahmud Khan had no superior right. In spite of that finding it was held that the resale in his favour by the first vendee was a perfectly good one, and the competing claims of the plaintiffs pre-emptors and of the second vendee were adjudicated upon on that basis. What No. 26 P. R. 1908 ⁽²⁾ really decided was that the doctrine of *lis pendens* did not apply in that case because the second vendee relied in answer to the plaintiff pre-emptor's suit for pre-emption, not upon the resale made to him after the institution of the suit, but upon his own right of pre-emption which existed prior to the date of the said suit and in recognition of which the re-sale took place in his favour. Whether that right was superior to or equal with that of the plaintiff pre-emptor was, upon the principle enunciated in the aforesaid decision, perfectly immaterial. We hold therefore, that the second sale made by Harnam Singh in favour of defendants Nos. 3 and 4 during the pendency of the plaintiff's suit for pre-emption was not bad by reason of the rule of *lis pendens*, which, in our opinion, has no application in this case; and we therefore decide the first question in favour of defendants Nos. 3 and 4. The ruling of the Allahabad High Court in *Narain Singh v. Parbat Singh* ⁽³⁾ which was incidentally relied on by the plaintiff's pleader, is not in harmony with the principle laid down in the above-mentioned decision of this Court and we are not prepared to follow it.

Upon the second question namely, whether on the facts found in this case and in spite of the re-sale in favour of the second vendee being perfectly valid, the plaintiff has a right to

(1) 7 P. R. 1910 (*Muhammad Khan v. Sardar*)

(2), 26 P. R. 1908 (*Mahmud Khan v. Khuda Bakhsh*).

(3) (1901) I. L. R. 23 All. 247.

share in the land sold under section 14 of the Pre-emption Act, we think that the Divisional Judge's view is erroneous. The section in question clearly applies only to cases in which several pre-emptors having instituted separate suits for pre-emption in respect of one particular sale are found by the Court to be equally entitled to the right of pre-emption. It does not apply to a case in which a pre-emptor is claiming to enforce his right of pre-emption by suit against an original vendee or a second vendee who has an equal right of pre-emption with such pre-emptor, (see No. 83 P. R. 1907) ⁽¹⁾. In the present case, therefore, the plaintiff who is the only pre-emptor before the Court, cannot take advantage of the provisions of section 14 aforesaid and claim to share in the land in dispute with the second vendee who has obtained it by a private re-sale by asserting his pre-emptive right against the original vendee but without bringing a suit for pre-emption in Court. The plaintiff's pleader does not seriously support the Divisional Judge's view on this point and we have no hesitation in holding that section 14 of the Pre-emption Act does not apply to the facts of this case.

For the foregoing reasons we accept this appeal and, setting aside the Lower Appellate Court's order of remand, dismiss the plaintiff's suit. As the plaintiff was justified in bringing his suit for pre-emption against Harnam Singh, and as his right has been defeated only by a private re-sale by Harnam Singh to defendants Nos. 3 and 4, against whom the plaintiff had *prima facie* a good ground for proceeding with his suit, we think that the parties should bear their own costs throughout and we direct accordingly.

Appeal accepted.

No. 54

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Shah Din.

TOTA MAL AND OTHERS—(DEFENDANTS)—APPELLANTS

Versus

SRI RAM AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 1010 of 1909.

Pre-emption—consideration for sale made up of previous debts—option under proviso to section 22, Punjab Pre-emption Act, II of 1905, when to be granted.

Where the consideration money for a sale, Rs. 1,200, was made up of previous debts and the market value of the property sold was found to be Rs. 780—

⁽¹⁾ 83 P. R. 1907 (*Khan Zaman v. Faltch Sher*).

Held, that the *proviso* to section 22 of the Punjab Pre-emption Act was applicable and the amount payable by the pre-emptor must be the market value or the vendees may, at the discretion of the Court, be put to their option of either accepting such value or having the sale cancelled.

Held also, that as the vendees, appellants, in this case, had not been able to show any equity in their favour, it was unnecessary for the Chief Court to allow the vendees any option in the matter and therefore the decree of the lower Appellate Court, decreeing the claim on payment of the market value, was confirmed.

Further appeal from the decree of Rai Bahadur Lala Mulraj, Divisional Judge, Ferozepore Division, dated the 22nd June 1909.

Kamal-ud-Din, for appellants.

Nemo for respondents.

The judgment of the Court was delivered by

JOHNSTONE, J.—In this case the first Court held 12th July 1911.
that of the two sets of rival pre-emptors, both of whom it found to have better rights than the vendees, Mussammat Khemon had the superior, and Thamman Ram and Kishna the inferior right; that the sum Rs. 1,200 mentioned in the deed as the sale money, had been fixed and paid in good faith, and that Mussammat Khemon must have the first option of purchase and the other two persons aforesaid the second.

Thamman having died, his sons appealed to the Divisional Court, praying that the sum payable should be reduced to Rs. 600 (Mussammat Khemon, having neither appealed nor paid the money, has dropped out of the case). The Divisional Judge, Mr. Scott-Smith, held that in the circumstances, inasmuch as the only evidence on the record seemed to indicate that the market value was only Rs. 400, and the sum of Rs. 1,200 aforesaid was wholly made up of *debts*, the proviso to section 22, Act II of 1905, would come in. He therefore, remanded in order that the real market value might be ascertained. The First Court reported Rs. 725 as the highest possible estimate; and then the new Divisional Judge, entirely misunderstanding the intention and meaning of the remand order, which accepted the First Court's finding that the price Rs. 1,200 was fixed and paid in good faith, found Rs. 780 the true market value and gave a decree for the pre-emption on payment of that sum, without giving any finding as to the price having been fixed and paid in good faith or not.

The vendees have now appealed, asking first, that Rs. 1,200 be re-instated as the price to be paid, and secondly, that the

vendees should have been given the option mentioned in the proviso to section 22 aforesaid. Before us the learned pleader for the appellants (respondents having failed to appear), contended himself with asking for the option aforesaid, and we have heard him on the subject.

The proviso certainly applies to the case, for Rs. 1,200 is, in our opinion, greatly in excess of Rs. 780, the market value, and the sum of Rs. 1,200 is entirely made up of previous debts; and the only difficulty is on what principles we should exercise the discretion allowed by the word "may" in the proviso. In a sense, no doubt, the price fixed was fixed "in good faith"; but this Court has held, apart from section 22 and the proviso, more than once that, when old debts are stated as the price in such cases as the present, the numerical total of those debts is not, and the actual value of a claim for those debts is, really the consideration for the sale, and, looking at it in this way, we cannot revert to the First Court's decree as the proper decree in the case. We must, in short, under the proviso either let the Divisional Judge's decree stand, or we must let the vendees have the aforesaid option.

In the said proviso the Legislature has introduced into the law of pre-emption a discordant note. Until that proviso was enacted, it was always understood that the pre-emptor simply stepped into the shoes of the vendee, and that neither vendor nor vendee could defeat him by resiling from the sale, but now the Legislature in its wisdom has thought fit to allow in certain circumstances, the vendee to back out, if the Court sees fit to let him do so. Not the smallest hint is given of the principles on which the Court is to act in exercising its powers, and in the present case the appellants have not been able to shew that any recognised equity exist in their favour. We have to consider not only their interests, but also that of the vendor, who, by a perfectly legitimate contract, wiped out his whole debt to the vendees by selling the land to them, and who, if we give vendees the option they crave, will find his contract cancelled and himself again saddled with a heavy liability. As no special equity in vendee's favour has been shewn to exist, we refuse them the option, and we confirm the decree of the Lower Appellate Court and dismiss the appeal. In the circumstances parties should bear their own costs.

Appeal dismissed.

No. 55.

*Before Hon. Mr. Justice Johnstone and Hon. Mr.
Justice Chevis.*

MUSSAMMAT BHAGAN AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

ALLAH DITTA AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 682 of 1909.

Sale—non-payment of consideration—intention of parties whether sale shall be complete without payment of consideration or not—relevancy of subsequent conduct of parties in ascertaining their intention.

Held that, although title in property sold can pass without payment of consideration, no title will pass where there is proof of an intention in both the parties that ownership should not pass until payment of consideration, and the subsequent conduct of the parties to the sale is relevant in order to shew whether the parties intended ownership to pass independently of the payment of consideration or not.

Further appeal from the order of Khan Bahadur Khan Abdul Ghafur Khan, Khan of Zaida, Divisional Judge, Sialkot, dated 21st April 1909.

Pestonji Dadabhai, Lajpat Rai and Barkat Ram, for Appellants.

Shahab Din, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—In this case the pleadings are fully set forth 20th Decr. 1910. in the judgment of the first Court and need not be repeated. The claim was for a declaration that the plaintiffs are proprietors of certain land in the village of Kot Sandhan. The first Court held that a deed of sale was no doubt executed by the late Gurmukh Singh in favour of Punjab, Sati and Burban, but that the consideration never passed and that the sale was never completed. As regards plaintiffs' claim that they had held the land adversely ever since the sale of 1870, the Court found that it was not proved.

On appeal the learned Divisional Judge took a different view. He agreed with the first Court that consideration did not pass, but he went on to hold that that fact alone cannot nullify the sale once completed. He then proceeded to record the finding that plaintiffs obtained possession of the land immediately after the sale deed was executed, and that plaintiffs had been in possession of the land purchased ever since. On these findings he reversed the decision of the lower Court and gave plaintiffs a decree. He made it a condition of their

taking possession that they should pay Rs. 200, the original sale money. That Court also discriminated between the 20 *ghumaos* 5 *kanals* of land mentioned in the deed of sale and the additional land in suit, which seems to be *shamilat*, which had been reclaimed since 1870. As regards that additional land the suit was dismissed.

The defendants have now appealed to this Court for dismissal of the plaintiffs' suit, while the plaintiffs have filed a cross-appeal asking for that aforesaid additional land. In our opinion the defendants' appeal must succeed,

The plaintiffs' pleader, Mr. Shahab-ud-din, lays great stress upon the well known principle of law that to make a sale complete it is not necessary that price should be paid. He quotes several rulings such as, 62 *P. R.* 1879 (1), 132 *P. R.* 1879 (2), 40 *P. R.* 1906 (3) and 153 *P. R.* 1882 (4). But in all these rulings there is a qualification to the effect that ownership does not pass if there is proof of an intention in both the parties that ownership should not pass until payment of consideration. In the present case Mr. Pestonji, for the defendants, has, in our opinion, succeeded in showing that there was an intention in the minds of the parties at the time of the sale that ownership should not pass until the money was paid.

Both the Courts, as stated above, have held that the sale money did not pass and we see no reason to come to a contrary conclusion. It also appears from an examination of such *jamabandis* as are available that from 1892 onwards plaintiffs have been cultivating certain portions of the land in dispute. It seems quite clear that they have not continuously held Gurmukh Singh's share in the *khata*. They seem to have held sometimes one field and sometimes another; sometimes more land and sometimes less; and they have been continuously entered as holding as tenants-at-will paying sometimes one rate of rent and sometimes another. It cannot be said from these entries that the plaintiffs have held the lands which have been included in the deed of sale as proprietors, and they have not produced any evidence worth speaking of to contradict these entries. The learned Divisional Judge has made a mistake when he says the plaintiffs obtained possession of the land immediately after the sale deed was executed.

(1) 62 *P. R.* 1879 (*Kahna v. Dewa Singh*).

(2) 132 *P. R.* 1879 (*Abbas Ali Shah v. Pir Baksh*).

(3) 40 *P. R.* 1906 (*Kanshi Ram v. Tota Ram*).

(4) 153 *P. R.* 1882 (*Allah Bakhsh v. Shama*).

In our opinion there is nothing to show this. In January 1871, when mutation was attempted upon the deed of sale, Gurmukh Singh appeared before the Tahsildar and stated that the vendees had not paid him the price. The Tahsildar, therefore, reported to the Deputy Commissioner that, as consideration did not pass, the mutation should not be sanctioned; and the Deputy Commissioner directed that mutation be refused because of the refusal of the vendor. In our opinion it cannot be inferred from this that plaintiffs had possession at that time. Indeed the ordinary natural presumption will be that they had not possession and, as we have seen, there is no evidence to show that they had possession of any part of the land until 1892. This agrees fairly with certain oral evidence produced by the defendants which attempts to show that after 1870 the vendees and their families left the village and remained absent for a protracted period, and that, when they did ultimately return to the village, they from time to time took portions of defendants' land for cultivation only.

The defendants' counsel does not contest the principle laid down in the rulings aforesaid to the effect that title in property sold can pass, although consideration has not been paid; but at the same time he argues, relying upon certain rulings of which 68 P. R. 1900 ⁽¹⁾ and 7 P. R. 1897 ⁽²⁾ (Revenue) are examples, that the conduct of the parties after the transaction of sale is important in order to ascertain whether the parties intended ownership to pass independently of the payment of consideration. Here it seems to us that the conduct of the parties makes it clear that the sale was never completed. Most probably the plaintiffs' ancestors did not take possession in 1870, and there is nothing to show that they ever held any part of this holding till 1892. After that they seem to have occupied portions of it, but it is not clear that they did so as proprietors. Indeed the indications are the other way. Therefore we think we are justified in holding that the conduct of the parties shows that they did not themselves consider that ownership had passed to the plaintiffs.

Mr Shahab-ud-Din makes a good deal of the reclamation of *shamilat* by the plaintiff. There is no doubt that the plaintiffs are in possession of a considerable area of reclaimed *shamilat*, but there is no direct evidence to show who reclaimed the land, and, although probably plaintiffs themselves reclaimed

(1) 68 P. R. 1900 (*Ram Chand v. Harnam Singh*).

(2) 7 P. R. 1897 Rev. (*Ghannya Singh v. Nihal Singh*)

it, we do not think that any presumption can be made that they did so as proprietors. Being a numerous and an energetic family, they may well have done the reclamation by consent of the owners, holding the reclaimed land also as tenants, though they may not have paid rent for it.

Lastly, the *dhal bachh* of the years 1901, 1904, 1905 and 1907 is forthcoming. In these Mal Singh and Mussammat Bhagan, his widow, are shown as *malguzars*, and Ishar Singh, witness No. 5 for plaintiffs, asserts that he collected revenue as in the *dhal bachh* and that the plaintiffs paid one-fourth *batai* to defendants. Other witnesses testify in the same way, and, on the whole, we think this a strong corroboration of the contention that the plaintiffs never became owners of this land.

For these reasons we accept defendants' appeal and reject the cross-appeal of the plaintiffs and dismiss the plaintiffs' suit with costs throughout.

No. 56.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Shak Din.

MUHAMMAD YASIN—(PLAINTIFF)—APPELLANT,

Versus

THE MUNICIPAL COMMITTEE, LAHORE—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 381 of 1908.

Municipalities—Power given to, under Acts to be construed strictly—Notice under section 92 for demolition of a building cannot be applied to case falling under section 95 of the Punjab Municipal Act, XX of 1891.

Held, that powers given to a Municipal Committee under Acts must be construed strictly and that consequently when a Municipal Committee issued notice upon the plaintiff for the demolition of a *Thara* apparently under section 92 of the Punjab Municipal Act and not under section 95, plaintiff was entitled to a declaration that the Committee had not the power to order the demolition of the *Thara* in the absence of proof that it had been erected recently.

First appeal from the order of A. H. Parker, Esquire, District Judge, Lahore, dated the 30th January 1908.

Mehr Chand, for appellant.

Hari Chand, for respondent.

The judgment of the Court was delivered by—

28th Feby. 1911.

JOHNSTONE, J.—The facts of this case are as follows:—

In 1863 Hafz Muhammad purchased a house in Guzar Chajja Diwani from Ghulam Muhammad, the owner. The

purchaser died some time ago and the house is now owned by Muhammad Yasin.

On the 1st June 1906 a notice was served upon the plaintiff by the Municipal Committee, Lahore, to the effect that the Committee had come to know that the plaintiff had without permission constructed a *Thara* and that the plaintiff was to remove that *Thara* within one week, or must submit an answer within that time. It was added that in default he will be dealt with under section 95 of the Municipal Act. To this the plaintiff replied on the 12th June 1906, pointing out that the *Thara* had been in existence for 50 years, that there must be some mistake, and that the notice should be withdrawn. No immediate attention seems to have been paid to this remonstrance, and nothing further was done for about a year, when on the 24th June 1907, the Committee again issued a notice, in which there was no reference to the previous notice, and in which it was again stated that the Committee had come to know that the plaintiff had erected without permission a *Thara* and that the plaintiff should remove the *Thara* within one week and that in default, proceedings will be taken against him "for the violation." In reply to this, three weeks later, the plaintiff again wrote in terms more or less like his previous letter. Again, the Committee took no special notice of this letter; but on the 18th September 1907 issued a more peremptory notice to the plaintiff in which, however, no reference was made to previous correspondence. This time the Committee allowed a period of six hours under section 147 of the Act and directed the plaintiff to remove the *Thara*, stating that in default proceedings would be taken against him for the violation. Upon this, seven days later, the plaintiff again made a remonstrance similar to the one he had previously made, and suggested that the orders of the Committee should be postponed, as he intended to make a representation to the Committee on the subject and also to bring a civil suit.

Therefore on the 11th November 1907 plaintiff filed a suit in which he prayed that,

- (a) a declaratory decree to the effect that the Committee is not competent to demolish the *Thara* or to order its demolition, may be passed in his favour;
- (b) Costs may be awarded to him, and
- (c) Any other relief, as the Court deems proper, may be granted to him.

The plaintiff had valued the suit at Rs. 6,000 for jurisdiction and affixed a court-fee stamp of Rs. 10 on the plaint.

In reply the defendant-Committee objected to the valuation, saying that the value was not more than Rs. 100, and then went on to object that the *Thara* was built without permission in January 1906, that the *Thara* was on a public street, that the Committee admitted that if the land belonged to the plaintiff, it had no authority to interfere, and finally, if the *Thara* was found to be on Municipal land or a public street, then the Committee had a right to demolish it, even if it had been in existence for many years, the plaintiff being only entitled to compensation under section 95 of the Act.

In his replication the plaintiff stated that the *Thara* was on his own land and not on land belonging to the Committee, that it was very old, and that the value of the suit was calculated on the value of the house; and finally plaintiff admitted that if the *Thara* was on the public road, he did not wish to sue for compensation in this case.

Upon this the learned District Judge drew up an issue.

Does this *Thara* or platform not project into or encroach upon the street? This issue was framed because the District Judge was of opinion that, if the *Thara* was on private land, the Committee could not order it to be removed in this manner; that if it was on the public street the Committee could, subject to giving compensation, order its removal, and that judging by the plan the *Thara*, *primâ facie*, was on the street.

The plaintiff was then called upon to produce evidence and he called three witnesses. These witnesses did not support him; in fact they said that the *Thara* was on the public street.

The District Judge therefore dismissed the plaintiff's suit with costs.

Against this decree the plaintiff appeals. In his memorandum of appeal he contends--

- (1) that the Committee wanted to demolish the *Thara* only because it was of opinion that the same had been recently built without its previous sanction, whereas, as a matter of fact, the *Thara* is old;
- (2) that the issue has been wrongly framed, and
- (3) that the Committee should have been made to prove that the land under the *Thara* was part of the street.

And on these contentions plaintiff asks for a decree.

These grounds of appeal do not really cover the case and we have allowed the plaintiff to take up a point which is not clearly stated in them, namely, that the Committee's notice was not legal and that the plaintiff was not bound to obey it. This point may be stated as follows :—

In the Municipal Act there are two sections under which a Committee may order the removal of a building or a portion of a building, *viz.* 92 clause (4) and 95 clause (2). Section 92 is concerned with new buildings and clause (4) lays it down that "should a building be begun without giving notice, or "without submitting plans, etc., or in contravention of any "legal orders of the Committee, the Committee may by notice "require the buildings to be altered or demolished, as it may "deem necessary."

Section 95, on the other hand, in its clause (2) says "that "a Committee may, by notice, require the owner or occupier of "any building to remove or alter any such projection or encroachment as aforesaid," these words meaning a projection or structure overhanging, projecting into or encroaching upon the street, etc.

Now it seems to us clear that the Committee in issuing these several notices did not act according to law. The wording of all the notices seems to refer to a case falling under section 92 of the Act and not under section 95; and the question is whether plaintiff, whose case is that the *Thara* is old and was constructed not by himself but in very ancient times, was bound to obey this notice, and whether the Court was justified in dismissing plaintiff's suit not on the ground that he had constructed the *Thara* without permission in recent times but on the ground that the *Thara* was on a public street, *i.e.*, not with reference to section 92 (4) but with reference to section 95 (2).

The powers given by the Act to Municipal Committees are an interference for the public good with the ordinary rights and privileges of the public, and we think that the law should be very strictly construed against Committees. If a Committee wishes to exercise these extraordinary powers it must do so strictly in accordance with law and procedure. It seems to us that the plaintiff is quite justified in asking the Court to decide whether the notices actually served on the plaintiff stated the facts correctly and gave sound reasons for the removal of the building concerned. We do not mean by this to say that the Courts will interfere with the discretion of the Committee

lawfully exercised ; for instance in the present case if the Committee had issued a notice to the plaintiff to this effect that " your *Thara* is on a public street and being so it obstructs ' traffic and you must remove it ' " then no Civil Court would have the right to go into the question whether the *Thara* really obstructed traffic or not ; but on the other hand when a Committee directs a person to remove a building on the ground that it has been recently made without permission, we do not think that plaintiff should be bound to remove that building, which has not been proved to have been made recently ; merely on the ground that it is on a public street.

For these reasons we accept this appeal and give plaintiff a decree as prayed, it being understood that it is open to the Committee still to serve a proper notice upon the plaintiff and to proceed thereafter according to law, the present decision simply implying that the Committee has not the power to order the demolition of the *Thara* at present, because, the notices sent being defective, it has not yet acquired the legal power to have the *Thara* removed.

The defendant-Committee will pay plaintiff's costs.

Appeal accepted.

No. 57.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.
Mr. Justice Rattigan.*

MUHAMMAD ALI AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

MUHAMMAD SHAH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 307 of 1908.

Joint contract—suit by 2 out of several lessees for possession of the whole land leased—maintainability of such suit—Indian Contract Act, IX of 1872, section 45.

Where the 2 plaintiffs together with 9 other persons (impleaded as defendants) had jointly entered into a lease of certain land with the defendants- lessors, and sued for possession of the land leased, the other lessees having refused to join in the suit and being in fact in collusion with the defendants- lessors—

Held, that the 2 plaintiffs were not only entitled, but indeed obliged, to sue for possession of the whole of the land leased.

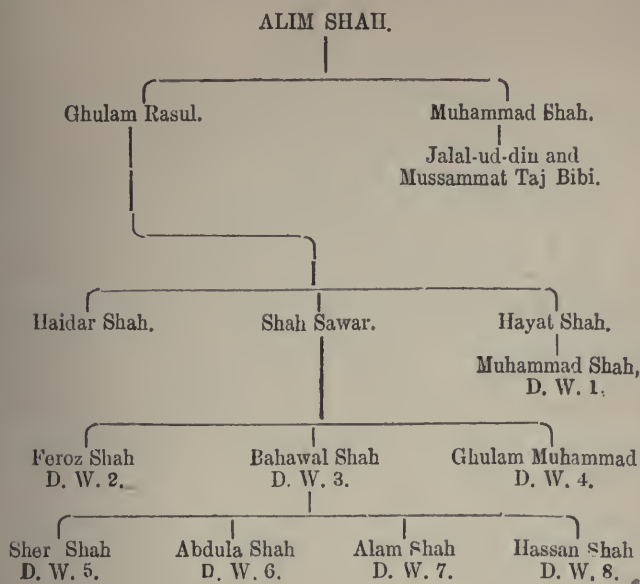
Appeal fr. m the order of Lala Chuni Lal, Additional Divisional Judge, Shahpur, dated 22nd August 1907.

Muhammad Shafi, for appellants.

Fazal Husain, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The following pedigree table will help 6th March 1911. towards an understanding of the facts of this case :—



Of the above persons at the time when the present suit was instituted Ghulam Muhammad (D. W. 4), Alam Shah (D. W. 7) and Hassan Shah (D. W. 8) were minors. On the 2nd February 1904, defendant No. 1 for himself, defendant No. 2 for himself and his minor brother defendant No. 4; defendant No. 3 for himself and defendants Nos. 5 and 6 for themselves and for their minor brothers defendants Nos. 7 and 8 executed a deed whereby they leased 35 squares of land (representing an area of 9,863 *kanals* 12½ *marlas*) situate in *manza* Dagbadhi Alam Shah formerly in the Montgomery District, but subsequently transferred to the Samundri *Tahsil* of the Lyallpur District, to the two plaintiffs and to defendants Nos. 9--17, for a period of 9 years and for a consideration of Rs. 14,000. This deed was duly registered, but it would appear that almost immediately after its execution some of the parties to it refused to abide by its terms the result being that on the 11th October 1904, the present plaintiffs (who were two of the eleven lessees) instituted the present suit in the Court of the Munsif, 1st Class, in the Montgomery District, for possession of the 17½ squares of the land which (according to their allegations) had been specifically and individually leased to them. The other lessees (defendants Nos. 9--17) refused to join in the suit and they were accordingly impleaded as co-defendants. An objection

was raised that the suit was bad for non-joinder inasmuch as the lessees had not all joined in the claim. This objection was considered and decided against the defendants by the Court in which the suit was then pending. Thereafter, the suit was transferred to the Munsif, 1st Class, at Lyallpur the transfer being rendered necessary by reason of the fact that the lands to which the claim related had since the institution of the suit been transferred to the Lyallpur District.

Upon the transfer of the case the defendants again raised the plea that the suit must be dismissed as all the lessees had not joined as co-plaintiffs and that section 45 of the Indian Contract Act was therefore a bar to the present claim. In reply to this plea plaintiffs urged—(1) that this objection had already been duly adjudicated upon and decided in their favour by a Court, which at the time had full jurisdiction to determine it; (2), that it was wrong in law; and (3) that plaintiffs were ready and willing to take over the whole bargain, if in the opinion of the Court they were in error in thinking that under the terms of the lease, they were entitled to claim merely the $17\frac{1}{2}$ squares out of the total area of the 35 squares which had been leased. This statement was made in December 1904 and before issues were fixed.

The Munsif ignored the first objection but apparently regarded the claim as by two of several co-promisees for enforcement of a contract in its entirety. He held that the lease was a contract entered into between the defendants Nos. 1—8, as lessors, and defendants Nos. 9—17 and plaintiffs as lessees jointly, and that as defendants Nos. 9—17 had refused to join in the suit, the suit as laid must fail by reason of the provisions of section 45 of the Contract Act. He accordingly dismissed the suit.

Plaintiffs thereupon appealed to the Additional Divisional Judge, and in this connection we may digress for one moment in order to show how utterly misleading the artificial value of a suit of this kind for jurisdictional purposes is when compared with the actual value of the land which is the subject matter of the suit. According to the rules for the valuation of this suit, the value of the half of this land which had admittedly been leased for nine years for a consideration in all of Rs. 14,000, was merely Rs. 900, this representing 30 times the revenue payable on the half of this land. And yet this half of the land was actually let for a period of seven years for Rs. 7,000. In point of fact, the actual value of the land is admittedly much greater than would appear from the latter figure for Mr. Fuzl-i-Husain was forced to admit that the

opposition to plaintiffs' claim was even in 1904, due to the fact that the defendants had realised that they had made a bad bargain.

To return however to the facts of the case. The Additional Divisional Judge upheld the decree of the Munsif upon two grounds. He held that the suit was bad, not only because all the promisees had not joined in the claim but also because plaintiffs were not entitled to claim performance of part only of the contract. The latter ground was obviously erroneous in view of plaintiff's express assertion that if the Court was of opinion that the lease was entire and indivisible they were ready and willing to take over the whole bargain. He rejected the plea of *res judicata* on the ground that the Montgomery Court had framed no issue on the point. But the question was purely one of law and no issue was necessary for its determination.

From the decree of the Additional Divisional Judge an application for revision was made to this Court on the 7th December 1907 (the decree of the Lower Appellate Court being dated the 27th August 1907), and was admitted as a further appeal, under section 70 (1) (b), of the Punjab Courts Act by the order of the Judge sitting as a Single Bench, dated the 25th February 1908. This appeal has now been heard by us and we have had lengthy arguments addressed to us by Mr. Muhammad Shafi and Mr. Fazal-i-Hussain, who appeared respectively for the plaintiffs and the defendants-lessors. Defendants Nos. 9—17 (the mortgagees-lessees) put in no appearance at this hearing and this appeal is decided *ex parte* against them. Mr. Shafi's argument is twofold. In the first place he contends that upon its true construction the lease is not only joint but several and gives specific shares to the various lessees and that it is, therefore, competent to any one of such lessees to sue for possession of the share so leased to him and this quite irrespective of action or inaction on the part of the other lessees. In support of this argument the learned counsel relies strongly upon the recitals in the deed which set forth that the land is leased to the various lessees in the shares therein specified (*i.e.* to Barkat Ali, $7\frac{1}{2}$ squares; Miran Bakhsh, 10 squares and so on).

In the second place, he contends that, if the lease be regarded as one joint contract, in favour of the lessees jointly, it is nevertheless open to any one of those lessees to sue in respect of it, and if the other lessees refuse to join in the suit, to make them defendants and to ask the Court to give the

plaintiffs a decree for possession of the whole of the land, leaving the plaintiffs to settle with such claims as the other lessees may have against the lessors. The plaint as framed is primarily concerned with the plaintiffs' right to possession of half the land leased, but Mr. Shafi points out that in it the plaintiffs ask for such other relief as in the opinion of the Court they may be entitled to, and also undertake to pay such sum as the Court may adjudge to be due from them. He also lays stress upon the fact that plaintiffs, when examined before the fixing of issues, stated in express terms that they were ready and willing, if the Court thought that such was their right, to take over the whole bargain.

In support of this latter contention, Mr. Shafi relied upon the judgment of Sir Meredyth Plowden in No. 156 *P. R.* 1889 (1); the expression of opinion of the Full Bench in No. 57 *P. R.* 1905 (2); and the following authorities *Pyari Mohan Bose v. Kedarnath Roy* (3), *Dwarka Nath Mitter v. Tara Prosunna Roy* (4), *Tarini Kant v. Nund Kishore* (5), *Shital Chandra v. Manik Chandra* (6), *Karattole Edamana v. Unni Kannan* (7) and *Biri Singh v. Nawal Singh* (8).

For the lessors, Mr. Fazal-i-Hussain argued that the lease was in reality but one contract entire and indivisible and that the lessors, when they found that nine out of the eleven lessees were not prepared to carry out the contract, were fully justified in resisting a claim by the other two for its enforcement. He laid great stress upon section 45 of the Indian Contract Act and argued that the object of granting the lease, so far as the lessors were concerned, was to enable them to redeem the entire property which had previously been under mortgage and that consequently when they found that defendants Nos. 9—17 (the previous mortgagees) declined to act up to their agreement as embodied in the lease, they (the lessors) were justified in opposing the present claim. Mr. Fazl-i-Hussain contended that the views of Sir Meredyth Plowden in the case cited were erroneous and that the correct exposition of the law was to be found in the judgment of Powell J. in the same case. He also referred to *Krishnarov Ram Chandra v. Manaji* (9) in support of this contention.

(1) 156 *P. R.* 1889 *F. B.* (*Kale Khan v. Seva Ram*).

(2) 57 *P. R.* 1905 *F. B.* (*Labhu Ram v. Kashi Ram*).

(3) (1899) *I. L. R.* 26 *Cal.* 409 *F. B.*

(4) (1890) *I. L. R.* 17 *Cal.* 160.

(5) (1883) 12 *Cal. L. R.* 588.

(6) (1909) 1 *Indian Cases* 254.

(7) (1903) *I. L. R.* 26 *Mad.* 649 *F. B.*

(8) (1902) *I. L. R.* 24 *All.* 226.

(9) (1875) 11 *Bom. H. C. R.* 106.

Before proceeding we may here deal with the conduct of defendants Nos. 9—17. These persons, at the date of the lease, were already in possession of some $17\frac{1}{2}$ squares of land as mortgagees, but there is nothing on the record to show whether the mortgages held by them were redeemable at any time, or not redeemable until after the expiry of a fixed period. But the fact remains that almost immediately after the execution of the lease, they decided to repudiate it, and there can be little doubt that throughout these proceedings they and the lessors have been acting in collusion. They have nothing to lose by taking up the position they have done. They are in possession of such part of the land as would come to them under the terms of the lease, and they are apparently quite willing to retain possession as such mortgagees. They therefore refused to join plaintiffs in the present suit and the lessors (who, if they so wished, could no doubt compel them to carry out the terms of that lease) now plead that as the defendant mortgagees will not carry out *their* part of the contract, "we are entitled to say to plaintiffs that you as merely two of the co-promisees cannot enforce performance of that contract." Owing to this dilatory plea the result has been that this suit which was (as already stated) instituted in October 1904, has not up to date proceeded beyond the stage of preliminary objections, seven years have elapsed and we are now concerned merely with the question whether the frame of the suit was or was not correct. Curiously enough, Mr. Fazl-i-Hussain complained that if at this stage plaintiffs were to be allowed to continue their suit, it might be that they would succeed in the end in securing a long lease of property which has vastly increased in value since 1904. This objection comes rather ungraciously from the parties who are responsible for this delay. The like remarks might also well apply to the same learned counsel's objections that in the interval his clients have thought fit to sell part of the land to third parties. This sale is said to have taken place in 1909, or, in other words, at a time when the plaintiffs' appeal was actually pending in this Court. We cannot agree with Mr. Fazl-i-Hussain that the vendees, who ventured to purchase property *pendente lite*, are entitled to any consideration at our hands. They have taken a risk, and they must be content to run the consequences of that risk.

To turn now to the construction of the lease and to the rights of plaintiffs thereunder. In our opinion, plaintiffs were wrongly advised in interpreting the document as giving them a right to sue for possession of a specific half share of the

land which was leased. The contract, as we read it, was joint and indivisible. The recitals, no doubt, specify certain shares of the lessee individually, but it is clear to us, from a consideration of the deed as a whole, that the various lessees were treated as but one person. In particular, the consideration for the lease is stated in round terms to be Rs. 14,000 and there is nothing in the deed from which it can be inferred that the lessors or the lessees intended or expected, that the lessees should pay this sum in proportion to the share respectively leased to them. On the contrary it is clear that the whole amount was due from the lessees as a body. Similarly, the other provisions of the deed contemplate a joint interest and a joint liability in all the lessees. Paragraph 1, for example, is to the effect that "the lease is to be for nine years and the lessees are to remain in possession and occupation of the land just as if they were proprietors and are to be responsible for losses and profits. If in any year or during any harvest the land is not irrigated from the canal, such period (of non-irrigation) shall be excluded from the period of the lease, and in lieu thereof the lessees shall be entitled to remain in possession of the land for that harvest over and above the harvest of nine years. If for any reason, the canal water ceases to irrigate the land now leased, the lessees shall be entitled to a refund of money proportionate to such period of the lease as then remains unexpired". It is unnecessary to refer in detail to the other clauses of the lease. But they are all drafted in similar terms, and obviously imply a joint contract with the lessees as one body.

Upon this view of the contract, it follows that the plaintiffs were not entitled to claim performance merely of part of the contract made with them by defendants Nos. 1—8 (the lessors), and that they could not, therefore, sue merely for possession of the $17\frac{1}{2}$ shares. This was the relief primarily sought by them. But conceding this, are we for this reason to hold that the courts were justified in throwing out the suit? We do not think so. It is clear from the plaint and the pleadings that the plaintiffs preferred their claim to the possession of those $17\frac{1}{2}$ squares in entire good faith and because they were advised, that they had no right to claim any thing more. It is also quite clear that plaintiffs were ready and willing to take over the bargain in its entirety, if, in the opinion of the court their proper remedy was to sue for possession of the whole of the land. They expressly ask in their plaint for such other relief as they may be entitled to, and they express their willingness to

pay such sum as the court may consider to be due from them in respect of such relief, and when orally examined, before the settlement of issues, one of the plaintiffs, for himself and his co-plaintiffs, stated that he was ready to take possession of all the land included in the lease. In the circumstances we consider that the Additional Divisional Judge was in error in holding that plaintiffs were splitting the contract into two and asking for fulfilment of part only of it. No doubt that was the relief primarily prayed for, but the learned Judge entirely overlooked the general tenor of the plaint and plaintiffs' oral pleas. Upon this point, then, we have no hesitation in holding that it was open to the courts upon the plaint as framed, to give plaintiffs (if their right was otherwise established) a decree for possession of the whole of the land conditional, of course, upon the payment of full court fees. And even if the courts had thought it necessary that the plaint should be amended before such decree could be passed, they ought to have given plaintiffs an opportunity of amending their plaint accordingly.

The main question, however, is whether it is competent to plaintiffs as two of the eleven co-promisees, to claim possession of the whole of the land in pursuance of the contract made with them and those other co-promisees jointly. *Primâ facie* it appears to be inequitable that they should be wholly deprived of their bargain, because it did not happen to suit the interests of the other promisees (who were already in possession as mortgagees) to join in the suit, plaintiffs were not in possession of any part of the land and they (and they alone) would suffer if this lease were held to be ineffectual. The lessors and the mortgagees lessees have colluded, and the latter declined to lend any assistance to the plaintiffs, surely it would be doing plaintiffs a grave injustice to hold that because of this collusion we might go farther and say, this fraud they are to be entirely deprived of rights which by duly registered deed were assured to them.

The authorities cited by Mr. Shafi to which we have referred above strongly support his argument that in cases of this kind when the promisee who is suing for enforcement of the contract, has made the promisees, who refused to join in the suit, co-defendants with the promisors, the court is competent to decree specific performance of the entire contract in favour of the plaintiff. This subject has been so thoroughly and exhaustively considered by Sir Meredyth Plowden in No. 156 P. R. 1889 (1) that it is unnecessary for us to say more than that we entirely agree both with his reasons and his conclusions.

(1) 156 P. R. 1889 F. B. (*Kale Khan v. Seva Ram*).

The actual question now before us was not indeed directly before the Full Bench in that case, and to that extent the learned Judge's remarks were *obiter*. But this fact does not detract from their force, and we observe that the later Full Bench ruling of this court (No. 57 P. R. 1905) ⁽¹⁾ refers with full approval to those observations. In neither case was the point finally decided, because in neither case was it directly in issue, but in view of those strong expressions of approval and of the other authorities to which reference has been made, we have no hesitation in accepting Sir Meredyth Plowden's remarks as enunciating sound law. Mr. Fazl-i-Hussain takes his stand upon section 45 of the Indian Contract Act. The present claim is for possession of land, and it may be open to doubt whether that section has any application to it. If it has not *cadit questio*, and as plaintiffs have complied with the requirements of the procedure law, their claim to the whole land must (as the record at present stands) be maintainable. But this claim is, in truth, for specific performance of a contract (see *Charna v. Bansi Lal* ⁽²⁾), and to such a suit it may well be open to the defendants to plead in bar the provisions of section 45 of the Contract Act. Conceding this, we nevertheless hold upon the weight of authority that plaintiffs were entitled to sue for performance of the entire contract and that the objection, that all the promisees had not sued, cannot deprive them of their rights of suit, where it is found that they have impleaded (as admittedly they have done) every person who is a necessary party to the suit.

We hold therefore (1) that plaintiffs were not only entitled, but indeed obliged, to sue for possession of the whole of the land, (2) that their plaint, as read with their oral pleadings include a prayer for such relief, (3) that their suit has been erroneously dismissed, and (4) that upon payment of the proper court fee, they are entitled to sue adjudication by the courts as to their right to possession of the whole of the area included in the lease upon which their claim is based. We, accordingly, accept this appeal and setting aside the decree of the lower Appellate Court we remand the case under order 41, rule 23, Civil Procedure Code, to the court of the Divisional Judge for determination of the appeal before him in accordance with the preceding remarks. Court-fee stamp on the memo. of appeal to be refunded. Costs to be costs in the cause.

Appeal accepted.

⁽¹⁾ 57 P. R. 1905 F. B. (*Labhu Ram v. Kashi Ram*).

⁽²⁾ (1908) 5 All. L. J. 539.

No. 58.

Before Hon. Mr. Justice Shah Din.

IDA—(PLAINTIFF)—APPELLANT,

Versus

RAHIM BAKHSH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 559 of 1910.

Custom—Succession—Chundawand or Pagwand—Sidhu Musalman Jats, mauza Pakhowali, tahsil Gurdaspur—Riwaj-i-am.

Held, that notwithstanding the entry in the *riwaj-i-am* of the Gurdaspur District in favour of the *Chundawand* rule, the *onus probandi* that this rule exists among Sidhu Musalman Jats of *mauza Pakhowali, tahsil Gurdaspur*, is on the person asserting it, and that he had failed to prove it.

Further appeal from the decree of W. A. LeRossignol, Esquire,
Divisional Judge, Amritsar, dated the 1st June 1909.

Brij Lal, for appellant.

M. C. Mukerji, for respondents.

The judgment of the learned Judge was as follows:—

SHAH DIN, J.—The question for decision in this appeal 9th March 1911. is whether the parties, who are Sidhu Musalmen Jats of *mauza Pakhowali* in *tahsil Gurdaspur*, are governed in matters of succession by the *pagwand* or by the *chundawand* rule. The lower Appellate Court has held that the *pagwand* rule of succession applies, and after hearing the appellant's counsel, I think that that decision is correct. Though the *riwaj-i-am* of the Gurdaspur District appears to be in favour of the *chundawand* rule, the Divisional Judge was, in my opinion, right in not placing the *onus probandi* on the defendants, considering that no specific instances in support of the said rule are cited in that *riwaj-i-am*. The plaintiff relies on two instances of *chundawand* succession evidenced by mutation orders, dated the 10th March 1904 and the 11th June 1906, respectively. These instances are not, however, of much value in the present case. The parties to the first-mentioned mutation proceedings were no doubt of the Sidhu *gôt* which is the *gôt* of the parties in this suit, but after mutation had been effected in accordance with the *chundawand* rule a suit was instituted by the sons of one of the wives of the deceased proprietor who were aggrieved by the mutation order with the result that a compromise was effected between the parties by which the *chundawand* rule of succession was not upheld. This instance therefore rather favours the defendants' position. The other

instance, namely that evidenced by the mutation of the 11th June 1906, relates to certain Sikh landowners of the Raju *gôt* and cannot be treated as of much value. As the Divisional Judge points out, the propriety of that mutation may yet be questioned in a Court of law.

I hold that the plaintiff, on whom the burden of proof rested, has failed to shew that the *chundawand* rule of succession prevails in his tribe, and maintaining the decree of the Lower Court, I dismiss this appeal with costs.

Appeal rejected.

No. 59.

Before Hon. Mr. Justice Rattigan.

MELARAM—(PLAINTIFF)—PETITIONER,

Versus

MUSSAMMAT BANDO AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Revision No. 2045 of 1909.

Pre-emption in respect of sale of a house or shop in a lane in bazar Baba Malak in the town of Nakodar—Punjab Pre-emption Act, II of 1905, section 6.

Held, that plaintiff, on whom the *onus* lay, had failed to prove that the custom of pre-emption existed in the Baba Malak sub-division of the town of Nakodar at the time of commencement of the Punjab Pre-emption Act, 1905, and that his suit for pre-emption must accordingly be dismissed.

Petition under Section 70 (1) (b) of Act XVIII of 1884 as amended by Act XXV of 1899 for revision of the order of A. II. Parker, Esquire, Divisional Judge, Jullundur Division, dated the 2nd June 1909.

Sheo Narain, for petitioner.

Nemo, for respondents.

The judgment of the learned Judge was as follows:—

9th March 1911.

RATTIGAN, J.—Plaintiff sued for pre-emption in respect of the sale of a house to two prostitutes. This house (or shops, for it is as yet not quite certain whether it is the one or the other) is situate in a lane in the bazar Baba Malak in the town of Nakodar, Jullundur District, and the plaintiff claims to be entitled to pre-empt the property on the ground that his house is adjacent to it and that both properties open out on a common roadway.

The Munsif found that a right of pre-emption had in two previous cases been established in *mohalla* Ghaus and *mohalla*

Kalian of this town, but he held that it was incumbent on plaintiff to show that the property was situate in a particular sub-division of the town, and that in that sub-division the custom of pre-emption had been proved to be in existence at the time of the commencement of the Punjab Pre-emption Act, 1905. He found that plaintiff had failed to prove these facts. He adds that "the material on the file and the very spot show that Baba Malak is also a distinct sub-division included in no *mohalla*. No custom of pre-emption has been shown to prevail there and there would be none. The bazar mostly consists of shops and is not a residential bazar. The shops have changed into prostitutes' houses. Sales have been occurring. No pre-emption case ever occurred in the locality. Hence plaintiff's case must fail." The suit was accordingly dismissed. Plaintiff appealed from this decision to the Divisional Judge, who dismissed the appeal on the ground that it had not been shown that the particular house was situate in any *mohalla*, and that no instances of pre-emption in the immediate neighbourhood had been alleged, whereas the circumstances of the case were such that there could be no considerations of convenience or privacy from which the existence of the right might be inferred.

Plaintiff applied for revision of the Divisional Judge's decree, and the learned Judge before whom the petition came in the first instance directed "notice" to issue. It is not clear from this order whether the petition was admitted to a hearing under Section 70 (1) (a) or Section 70 (1) (b) of the Punjab Courts Act, but I presume that it was intended that it should be admitted as a further appeal under the latter clause,

Mr. Sheo Narain appeared for the plaintiff, but the respondents were neither present nor represented by counsel, and I therefore proceeded to hear the appeal *ex-parte*.

Section 6 of Punjab Pre-emption Act enacts that "a right of pre-emption shall exist in respect of urban immoveable property in any town or sub-division of a town when a custom of pre-emption is proved to have been in existence in such town or sub-division at the time of the commencement of this Act, and not otherwise."

In the present case plaintiff's contention is that Nakodar is a comparatively small town with no real sub-divisions, though there are certain, more or less ill-defined, *mohallas* in it. The property in suit cannot be said to be situate in any specific sub-division, and therefore if plaintiff can show that the custom of pre-emption has been recognised in this town, its

existence must be presumed with regard to this particular locality. Plaintiff relies strongly upon two decisions of the District Judge (Mr. Muhammad Latif), Jullundur, in support of his contention, (1) in the case of Dhirta Ram *versus* Umru Mal, decided on the 13th June 1896, and (2) in the case of Ghaus *versus* Ghulam Farid, decided on the 21st December 1894. So far as I can gather, no appeal was preferred from either decision.

In his judgments in these two cases, the District Judge was dealing specifically with the question whether the custom of pre-emption prevailed in the *mohalla* Ghaus and the *mohalla* Kalian, respectively, but in both judgments the learned Judge distinctly stated that the custom prevailed throughout the town of Nakodar. This statement was, however, *obiter*, as the learned Judge had merely to decide whether the custom actually prevailed in the particular *mohalla* with which each case was concerned.

On the other hand, it was held by this Court in No. 109 P. R. 1900⁽¹⁾ that the pre-emptor had failed to prove that he was entitled to pre-empt certain property situate in *mohalla* Bhabra of this town. The decision is inconclusive, as it proceeded upon the special facts of that case, the learned Judge (Chatterji, J.) holding that the plaintiff had failed to prove the existence of the custom on the peculiar facts set forth in his plaint. It is, however, noteworthy that the defendant in that case admitted the existence of the custom of pre-emption in the town of Nakodar (pp. 428, 429 of the report). It may now be accepted as a received proposition of law that in every case where a town is sub-divided, the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-division in which the property is situate, and that the *onus* is not discharged by proof of the custom in the neighbouring sub-divisions, 100 P. R. 1892⁽²⁾, 17 P. R. 1895⁽³⁾, 70 P. R. 1899⁽⁴⁾, 58 P. R. 1900⁽⁵⁾, 109 P. R. 1900⁽¹⁾, 83 P. R. 1901⁽⁶⁾, 16 P. R. 1902⁽⁷⁾, 42 P. R. 1903⁽⁸⁾, 99 P. R. 1906⁽⁹⁾.

In the present case both Courts are agreed that there are certain *mohallas* in Nakodar, and the Munsif finds in express

(1) 109 P. R. 1900 (*Mela Ram v. Prema*).

(2) 100 P. R. 1892 (*Thakar Dass v. Muhammad Bakhsh*).

(3) 17 P. R. 1895 (*Raman Mal v. Bhagat Ram*).

(4) 70 P. R. 1899 (*Saudagar Mal v. Aman Singh*).

(5) 58 P. R. 1900 (*Natha Singh v. Billa Singh*).

(6) 83 P. R. 1901 (*Hakim Rai v. Muhammad Din*).

(7) 16 P. R. 1902 (*Panna Lal v. Bhagwan Das*).

(8) 42 P. R. 1903 (*Sant Singh v. Jowala Sahai*).

(9) 99 P. R. 1906 (*Mamon v. Ghausala*).

terms that the town "consists of well recognised sub-divisions, "there being (1) *mohalla* Kalian, (2) *mohalla* Ghaus and (3) the "locality called *darwaza* Charsi." The Divisional Judge is not so explicit in his judgment, but it is clear from its general tenor that he is also of opinion that the *mohallas* Kalian, Ghaus and Bhabra are recognised sub-divisions of the town.

This being the case, am I justified in presuming that the custom of pre-emption exists in other parts of the town of Nakodar, because it has been found to exist in two of the above *mohallas*? Admittedly the right has not been established in respect of the sale of any property in the locality in which the property now in suit is situate. The Munsif personally inspected this locality and found that of the seven houses in this lane five were occupied by prostitutes for the purposes of their trade, and one by the plaintiff's witness, Munshi, Bania. It is also in evidence that though houses in the lane have frequently been sold, no claim for pre-emption has ever been preferred prior to the one now under adjudication, and plaintiff's own witness, Munshi Ram, admitted that he knew of no claim to pre-empt having been preferred in respect of the sale of any house in *bazar* Baba Malak.

But Courts are agreed that the custom of pre-emption is not likely to exist in a locality where the houses are occupied mostly by prostitutes.

Mr. Sheo Narain's argument (as I understood it) was that there were really no sub-divisions in Nakodar, and that as the custom of pre-emption had been found to exist in certain parts of the town, the presumption was that it existed generally. But against this argument we have the fact that the District Judge in 1894 and 1896 and the Munsif in the present case have distinctly found that there are well recognised sub-divisions of this town, and the Divisional Judge (Mr. Parker) has apparently arrived at the same conclusion, though he does not say so in express terms.

If this is the case, then the fact that the custom exists in one or more of such sub-divisions does not prove that it exists in the locality where the property now in dispute is situate. Evidence to that effect would in the words of Chatterji, J. (in No. 109 P. R. 1900) ⁽¹⁾ have but a very remote relevancy on the question now in issue, and could not in any event *per se* suffice to prove the existence of the custom in this particular locality. And admittedly there is no other proof.

(1) 109 P. R. 1900 (*Mela Ram v. Prema*).

Mr. Sheo Narain's next argument is that even if there are some sub-divisions of Nakodar, the present locality is not situate in any sub-division and therefore plaintiff is entitled to refer to the *mohalla* Ghaus and *mohalla* Kalian cases as showing that the custom exists in the town. I do not think there is any force in this contention. It is well known that in Lahore city there are recognised sub-divisions, but in No. 2 P. R. 1903 (1) a Division Bench of this Court held that though Pari Mahal was not a sub-division of that city it was for the pre-emptor to prove that the custom of pre-emption prevailed in that locality, quite irrespectively of the fact that it did or did not prevail in the sub-divisions of the city.

Both the Lower Courts are agreed that plaintiff has failed to prove his claim, and it must be remembered that the case has come up to this Court, not as a further appeal as of right, but upon petition for revision. It is also clear that "the right of pre-emption is a right of a very special kind, and as it has a tendency to hamper the free disposition of property, it requires to be clearly and unequivocally shown to exist before it can be enforced," (Chatterji, J. in No. 109 P. R. 1900) (2). Further, the Munsif, who decided this case, not only personally inspected the locality, but also fully and most carefully considered the facts and the evidence and gave sound reasons for the conclusions at which he arrived. In view of all these circumstances I do not think that I should be justified in upsetting the decrees of the Lower Courts simply on the strength of the two decisions of the District Judge in 1894 and 1896, both of which were before the Lower Courts and were duly considered by them. Mr. Sheo Narain argues that there is no evidence to show, that a claim for pre-emption in respect of the sale of property in the town of Nakodar has ever been rejected on the ground that the custom does not exist. But this is rather begging the question, and respondents might well reply, "Has a claim for pre-emption ever been preferred in respect of such sales outside the limits of *mohallas* Ghaus and Kalian," The Munsif relying upon plaintiff's own witnesses, asserts that though many such sales have occurred, no claim to pre-empt has ever been put forward, and I see no reason to doubt the correctness of this statement.

(1) 2 P. R. 1903 (*Kishen Singh v. Jai Kishen Das*).

(2) 109 P. R. 1900 (*Mela Ram v. Prema*).

I accordingly dismiss this application, but as respondents have not appeared, without costs.

Revision rejected.

No. 60.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon. Mr. Justice Rattigan.

**SAYAD MIR NAWAB AND OTHERS—(PLAINTIFFS)—
APPELLANTS,**

Versus

HARDEO AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 417 of 1908.

Appeal—abatement of, on death of one of two representatives of the body of respondents when more than six months have elapsed before application is made to have legal representative of deceased made a party—Civil Procedure Code, order XXII, rule 4 (3).

Held that on the death of one of two representatives of the body of respondents an appeal abates, where no application has been made within six months to have the legal representative of the deceased made a party.

6 months

Held also that the plea of ignorance of the death until after the expiry of limitation does not justify departure from the rule laid down in order XXII, rule 4 (3), Civil Procedure Code, which is imperative.

Further appeal from the order of A. E. Martineau, Esquire, Divisional Judge, Delhi Division, dated the 9th December 1907.

Nabi Bakhsh, for appellants,

Pestonji Dadabhai, for respondents.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—The finding on remand is that 17th March 1911. Ghisa died on the 14th December 1909. He was one of two respondents appointed on the 28th October 1909 under order I, rule 8 of the Code of Civil Procedure, to represent the respondents who were numerous. Several respondents had died a year or more before October 1909, and the appellants neglected the duty of keeping themselves acquainted with the necessity for substitution.

On the 7th July last application for substitution to Ghisa was made, more than six months after his death. The correctness of the finding as to the date of Ghisa's death was not contested and fraudulent concealment of his death was not set up. It was merely pleaded that he lived 5 or 6 miles from the appellants and that the latter were ignorant of his death until after the expiry of limitation. Order XXII, rule 4 (3) of the

Code is imperative, and no circumstances which can be held to justify departure from the rule, that the appeal should be dismissed, have been established.

The appellants have been grossly careless and have only themselves to thank for the abatement.

The decree was joint and we concur in the exposition of the law contained in the judgment of a Division Bench in Civil Appeal 649 of 1907, that on the death of one of two representatives of the body of respondents the appeal abates.

The preliminary objection is allowed and the appeal is dismissed with costs. Counsel's fee thirty-two rupees, the value of the suit being Rs. 1,200 and the appeal having been admitted as to a portion of the decree only.

Appeal dismissed.

No. 61.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

GURMUKH SINGH—(DEFENDANT)—APPELLANT,

Versus

MAKHAN SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 1291 of 1909.

Hindu Law—gift to Hindu female—interpretation of deed of gift.

Held, following *Suraj Mani v. Rabi Nath Ojha* (1) that a deed in favour of a Hindu female has to be interpreted in the same way as any other deed, and that if the wording of the deed, taken as a whole, points to an intention to confer full ownership, the full ownership is conveyed just as if the beneficiary was a man.

Held also, that the *dictum* of their Lordships of the Privy Council must be taken as rendering obsolete the main principle on which the ruling in 27 P. R. 1898 (2) was based.

First appeal from the order of Baba Mihan Singh, Subordinate Judge 1st class, Amritsar, dated the 24th November 1909.

Lal Chand, for appellant.

Hukam Chand, for respondents.

(1) (1908) I. L. R. 30 All. 84 P. C.

(2) 27 P. R. 1898 (*Rallia Ram v. Mussammat Ved Kaur*).

The judgment of the Court was delivered by—

JORNSTONE, J.—The pedigree table in the judgment of the 9th August 1911, Court below shows the manner in which the parties are related.* Defendants 1 and 2 having, by a deed dated 6th May 1909, sold to defendant 3 for Rs. 6,000 the property in suit, which they had received by gift from Sant Singh, late husband of defendant 2, plaintiff, as reversioner of Sant Singh, sues for the usual declaration that the sale shall not affect his rights after the death of the vendors.

Defendants put in several pleas of which we need now only notice two, *viz.* that defendants 1 and 2 were absolute owners with unfettered powers, inasmuch as in Sant Singh's hands the property was not ancestral *qua* plaintiff and the deed shows the gift to have been one of full ownership; and, secondly, that the matter is *res judicata*. The plea that the sale was for consideration and "necessity" is not urged now.

The Court below, after considering several rulings, held that Sant Singh did not intend to give the ladies full proprietary rights, and that, therefore, in the absence of proof of consideration and "necessity," plaintiff had a right to the declaration sued for. It also held that the matter was not *res judicata*.

The vendee, defendant 3, has appealed and we have heard arguments and have gone through the record.

The learned subordinate Judge has stated, not unfairly, the general drift of the two sets of rulings examined by him. In the first set (see margin) the decision was based more or

(1) *Koonjbehari Dhur v. Prem Chand Dutt.*

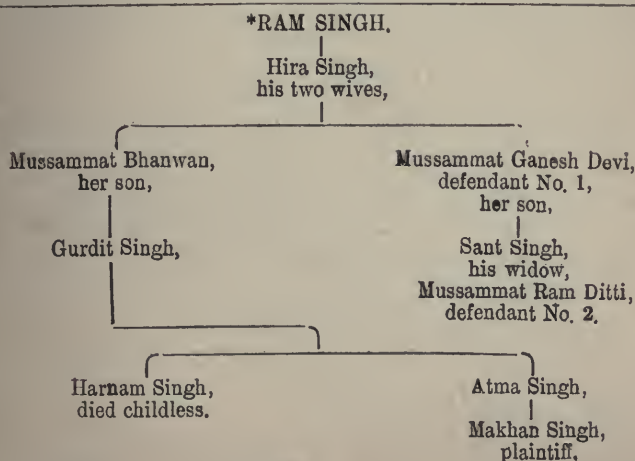
(2) *Punchoo Money Dossee v. Troylucko Mohiney Dossee.*

(3) *Hira Bai v. Lakshmi Bai.*

(4) *Ganpat Rao v. Ram Chandar.*

(5) *Nunnu Meah v. Krishnasawnu.*

(6) 27 P. R. 1898.



(1) (1880) I. L. R. 5 Cal. 684.

(2) (1884) I. L. R. 10 Cal. 342.

(3) (1887) I. L. R. 11 Bom. 573.

(4) (1889) I. L. R. 11 All. 298.

(5) (1891) I. L. R. 14 Mad. 274.

(6) 27 P. R. 1898 (*Rallia Ram v. Musamma Ved Kour*).

less on the idea that, in interpreting the meaning of a gift to a Hindu female, "it is necessary to take into consideration the ordinary notions and wishes of Hindus, which are repugnant to giving a female a power of alienation over immoveable property." Dealing with deeds of gift, &c., in this spirit, the courts in these cases held that full powers had not been transferred to the female donees, or legatees, notwithstanding that in some cases at least the decision would have been the other way had the donees or legatees been males. So strongly does Mr. Hukam Chand, Pleader for the plaintiff in the present case, support this way of looking at such questions that he even goes so far as to assert that a Hindu practically *cannot*, whatever his wishes and intentions may be, give to a Hindu female full proprietary right in landed property. We need hardly say we are unable to accept this proposition.

(1) *Lala Ram Jewan Lal v. Dal Koer.*

(2) *Lalit Mohun Singh Roy v. Chuk-kun Lal Roy.*

(3) *Rajnarain Bha-dury v. Ashutosh Chuckerbutty.*

(4) *Rajnarain Bha-dury v. S. M. Katya-yani Dabee.*

(5) *Padam Lal v. Tek Singh.*

(6) *Chandradeo Singh v. Mata Prasad.*

(7) *Suraj Mani v. Rabi Nath Ojha.*

Turning to the second set of rulings (see margin) we find that the leading idea in them is that a deed in favour of a Hindu female is to be interpreted exactly in the same way as any other deed, and that, if the wording of the deed, taken as a whole, points to an intention to carry full ownership, then full ownership is conveyed just as if the beneficiary were a man. It seems to us that this principle is the sounder one of the two, and the matter has been for us set at rest by *Suraj Mani v. Rabi Nath Ojha* (7) which was followed in *Thakar Parshad v. Jamna Kunwar* (8). The *dictum* of their Lordships in the former case must be taken as rendering obsolete the main idea in the Punjab case of 1898, quoted on the margin above. We must, then, interpret the deed of gift in the present case on its merits, allowing no importance to the circumstance that the donees are females. The full transliteration of the deed is as follows :—

Manke Bhai Sant Singh wald Bhai Hira Singh, Kaum Kalariah, Sakin Amritsar, Katra Nihal Singh ka hun. Jo ke jaidad juddi wa pidri se mujh ko mubligh 29,000 rupaya aur ek haveli wa se kita dukanat wake Katra Hardas Bunga wa ek dukan wake Katra Majith Mundi Bhai Gurdit Singh Sahib biradar Kalan se taksim ho kar mili thi. Usmen se mubligh 10,000

(1) (1897) *I. L. R.* 24 *Cal.* 406.

(2) (1897) *I. L. R.* 24 *Cal.* 834, *P. C.*

(3) (1900) *I. L. R.* 27 *Cal.* 44.

(4) (1900) *I. L. R.* 27 *Cal.* 649, *F. B.*

(5) (1907) *I. L. R.* 29 *All.* 217.

(6) (1908) *I. L. R.* 31 *Mad.* 176, *F. B.*

(7) (1908) *I. L. R.* 30 *All.* 84, *P. C.*

(8) (1909) *I. L. R.* 31 *All.* 308.

rupaya nakd waste guzara ayal wa itfal ke walda Sahiba Mussamm-
mat Ganesh Devi ko diya tha, aur mubligh 5,000 rupaya nakd
wa nisaf haveli mae wera dukan waste guzara Mussammam Ram
Dei zauja meri ke bamujab hukam adalat milna tajeviz ho kar diya
gaya hai. Ab Mussammaman mazkur ko ikhtiyar hai ke jis taur
chahen mublighat mazkur ko apne tassarruf men larwen aur jis
taur chahen kharch karen. Mera un mublighat se kisi tarah ka
kuchh dawa ya hak nahin raha. Aur jo kul haveli mae se kita
dukanat wake Katru Hardas Bunga men hain aur jis men meri
walida aur meri aurat abad hain wuh makan jaddi Bibi Ganesh
Devi walida Mussammam Ram Dei zauja apne ko bahissa masawi
nisfa nisf hiba karta hun, ke mera kisi tarah ka koi dawa ya
wasta ya hak nisbat makanat wa mublighat mundarja bala nahin
raha. Har do mauhuban ka hak hai, mujh ko aur mere lawahikan
ko ainda nisbat makanat wa mublighat mundarja bala se kuchh
dawa nahin raha aur na hoga.

The translation in the paper book being faulty in some re-
spects we have thought it best to reproduce the document in
Roman-Urdu here. Mr. Hukam Chand tried to argue that the
deed was a mere fiction and that it was not proved, as the original
was not on the record. Both contentions we have overruled,
the former as there is nothing to support the idea, and the latter
because no objection was taken at the proper time to the use of
a certified copy. As a matter of fact the original is in court,
being on the record of the previous suit of 1894-95.

In our opinion the deed recites that first Rs. 10,000 cash
had been given to one lady; and to the other Rs. 5,000 and half
of a *haveli* and of 3 shops; and goes on to say (a) that the ladies
may keep the said *monies* as they please and spend them as they
please, and (b) that now the executant gives (*hiba*) the *haveli* and
the 3 shops outright to the ladies; and more than once it is said
that the executant and his heirs shall have no right in or concern
with or claim to either the sums of money or the immoveable
property gifted. In our opinion this is sufficient warrant for
holding that the deed was one of out-and-out gift of full rights.
Previously there had been partial transfer of property to the
ladies for maintenance, but this deed goes further and gives full
ownership. The moveable and immoveable property is lumped
together in the phrases by which the executant disclaims all fur-
ther interest in it. Mr. Hukam Chaud is unable to present to us
any intelligible argument to meet the above: he keeps harping
on the fact of the donees being females, which, as we must hold,
is beside the mark. He admits that in *Ganpat Rao v. Ram*

Chandar (') which he calls one of his strongest cases, the decision would have been in favour of the donees had they been males ; and we can therefore almost assume that in the present case also, had the donees been males, he would admit that he had no case.

In these circumstances it is not necessary to go into the question of *res judicata*.

We accept the appeal and dismiss plaintiff's suit with costs throughout.

Appeal accepted.

No. 62.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon.
Mr. Justice Johnstone.*

SHANKAR DAS—(DEFENDANT)—APPELLANT,

Versus

GOBIND RAM—(PLAINTIFF)—AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 185 of 1911.

Joint mortgage—redemption of share of one of the mortgagors, when admissible—Qu. whether the mortgagor should first sue for partition.

Where plaintiff as one of the *khewatdars* sued to redeem the whole land originally mortgaged by its sole owner Fazla, which in 1869 (after Fazla's death without leaving heirs) became *shamilat-i-deh*.

Held that, though the mortgage was originally indivisible, it ceased to retain its indivisible character when in 1869 the mortgagee as a *khewatdar* became part-owner of the equity of redemption and accepted that position, and that consequently each co-sharer could redeem his share separately but not the whole.

Held also, that it was not necessary for plaintiff to have the *shamilat* partitioned before he could redeem his share of the mortgage.

Further appeal from the order of P. S. Agnew, Esquire, Additional Divisional Judge, Lahore Division, dated the 22nd August 1910.

Gobind Das, for appellant.

Shoo Narain, for respondents.

The judgment of the Court was delivered by—

29th May 1911.

JOHNSTONE, J.—At first sight this looks a somewhat complicated case, but the point we have to decide may be stated and explained in a few sentences. The question on which the case was admitted and ultimately referred to a Division Bench is that set forth in grounds 1 and 2 only. We have

ruled that the question of limitation raised in ground 3 cannot be re-opened.

Shankar Das, defendant-appellant, is, as the result of a series of transactions, mortgagee of the land in suit. The land was mortgaged by one Fazla, its sole owner, probably about 1829, and when in 1869 it was found that he had died and left no heirs, the land became *shamilat-i-deh* and so the property of the whole of the *khewatdars*, who number some 350 and of whom Shankar Das himself is one and original plaintiff another. Plaintiff sues to redeem the whole land, asserting that as one of the proprietors he is an interested person and has the right so to do. The first Court, after discussing conflicting authorities, held that the suit must fail both as regards the original plaintiff and the added plaintiff, whose position was virtually the same.

The learned Divisional Judge took a different view and held that, however inconvenient the result may be, the right of plaintiff to redeem the whole is in accordance with a fundamental part of the law of mortgage. He therefore gave plaintiff a decree, as prayed, for redemption of the whole on payment of Rs. 100, original mortgage money, apparently ignoring the added plaintiff, whom we may also ignore, as he has not appeared in this Court or otherwise raised any objection.

The way we look at the case is this. The mortgage was no doubt one and indivisible originally; but in 1869, when Shankar Das, mortgagee, became also part owner of the equity of redemption and accepted that position when the land was entered up as *shamilat-i-deh*, the mortgage ceased to retain its indivisible character and became liable to piecemeal redemption. Virtually Shankar Das had redeemed his share, and so thereafter each and every co-sharer could redeem *his* share separately. But this state of affairs having come about no co-sharer is an interested person as regards the shares of his fellows; if mortgagee could resist piecemeal redemption, then each co-sharer would be so interested, but as matters stand he is not. Again, we reject the appellant's contention that plaintiff must first partition the *shamilat* before he can redeem his own share of this mortgage. We can see no difficulty in his being allowed to redeem his own share unpartitioned, and the ascertainment of that share and of the proportion of the mortgage money to be paid by plaintiff can conveniently be ascertained in execution. Lastly, we overrule appellants' contention that, inasmuch as he is one of the proprietary body himself and the land is *shamilat*, no other co-sharer can inter-

fere with his actual possession until partition and so plaintiff cannot have a decree for joint possession even. In our opinion appellant, being in possession not as a co-sharer but as a mortgagee cannot take advantage of the rule of customary law on which he relies.

A few words regarding the authorities cited before us will explain how we have arrived at the above conclusion.

In *Naro Hari Bhawe v. Vithalbhat* ⁽¹⁾ the question was not decided. There mortgagee had become part owner of equity of redemption by purchase after the suit had begun, and the learned Judges declined to allow this incident to influence the case. *Mora Joshi v. Dinkar Joshi* ⁽²⁾ admits that a part owner of equity of redemption cannot be made to sue for partition before suing for redemption, but goes on to hold that, though the mortgagee has purchased part of the said equity, plaintiff can redeem only the whole, "there having been no separation whatever of any share." We agree in this as regards the matter of partition, but we are unable to see that in the case now before us (or even in the Bombay case) the mortgage remained one and indivisible. In the Bombay case the mortgagee had by purchase destroyed the unity of the security, and here the same result has been brought about by the land becoming *shamilat* and appellant accepting the position of part proprietor. In *Narain v. Ganpat* ⁽³⁾ a distinction is drawn between acquisition by the mortgagee of part of the equity of redemption by purchase and acquisition by inheritance (as here), and in the latter case it seems to have been held that suit for redemption only of a plaintiff's share would be competent. Anyhow this is our view as to cases of acquisition by inheritance, and, though the ruling is by no means very clear on the point and the *dictum*, if it is a *dictum*, is *obiter*, there is nothing in the ruling really opposed to our views in the present case.

In *Marakar A. K. Mamu v. P. Kuttu* ⁽⁴⁾ it was laid down that where a mortgagee in possession acquires a right to a share in the property mortgaged, he cannot be compelled to surrender the mortgaged property on payment of the debt, or of any part of it on payment of a proportionate amount of the debt, until the mortgagor has, by a proper suit for partition, ascertained definitely the shares of the co-owners. With all deference we think there are other ways of ascertaining definitely the shares

⁽¹⁾ (1886) I. L. R. 10 Bom. 648 (658).

⁽²⁾ (1891) I. L. R. 15 Bom. 24.

⁽³⁾ (1897) I. L. R. 21 Bom. 619.

⁽⁴⁾ (1892) I. L. R. 6 Mad. 61.

of the co-owners besides a suit for partition. In the judgment the learned Judges say that to allow redemption of a part would be to convert the suit into one for partition; but we cannot see that a decree for redemption of a share and joint possession *pro tanto* can be said to be a decree for partition. This judgment was followed in *Thallai Chetti v. Ramanatha Ayyan* ⁽¹⁾ in which certain inconveniences supposed to arise from allowing piecemeal redemption are stated and given as the reason for the decision. We are unable to see any balance of convenience in the course laid down in these rulings as the proper one; and we cannot see how plaintiff's claim to redeem his own share can possibly be resisted.

The rulings, on the other hand, which we entirely approve, are, *Grish Chunder Dey v. Yuramoni De* ⁽²⁾, *Kallan Khan v. Mardan Khan* ⁽³⁾, *Munshi v. Daulat* ⁽⁴⁾, *Hamida Bibi v. Ahmad Hussain* ⁽⁵⁾ Allahabad case.

In the first three of these cases it was laid down that in such cases as the present a part owner of the equity of redemption could redeem only his own share and not shares of his co-owners because the security has been broken up; and the fourth case expressly rules that there is no distinction between acquisition by purchase and by inheritance on the part of the mortgagee.

For these reasons we accept the appeal and give plaintiff a modified decree to the effect that he may redeem his own share of the mortgaged property by payment of proportionate share of the mortgage money, the share to be ascertained in execution, and that, upon payment by him of his share, he shall have joint possession in respect of his share with appellant Shankar Das.

Parties to bear their own costs of all Courts.

Appeal accepted.

NO. 63.

Before Hon. Mr. Justice Johnstone.

MUHAMMAD ALI—(DEFENDANT)—APPELLANT,

Versus

MUHAMMAD IKRAM AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 844 of 1910.

Custom—Alienation—Kureshis, Mianapura, Sialkot city—Muhammadan

Law—onus probandi.

⁽¹⁾ (1897) *I. L. R.* 20 *Mad.* 295.

⁽²⁾ (1900) 5 *Cal. W. N.* 83.

⁽³⁾ (1906) *I. L. R.* 28 *All.* 155.

⁽⁴⁾ (1907) *I. L. R.* 29 *All.* 262.

⁽⁵⁾ (1909) 1 *Indian Cases* 779.

Held that, although Kureshis of Mianapura, Sialkot city, do not in all matters follow Muhammadan Law, the burden of proving that the tribe follow a custom under which alienations by a male proprietor are controllable by his reversionary heirs is on the latter and that in default of such proof personal law must be applied.

Appeal from the order of Khan Bahadur Khan Abdul Ghafur Khan, Khan of Zaida, Divisional Judge, Sialkot Division, dated the 8th April 1910.

Abdul Kadir, for appellant.

Fazl-i-Husain, for respondents.

The judgment of the learned Judge was as follows :—

15th June 1911.

JOHNSTONE, J.—This is a revision admitted under clause (b), section 70 (i), Punjab Courts Act. Respondents' Counsel objects that the petition was filed as under clause (a), and that therefore under the provisions of section 70 and a recent Circular of the Court, nothing can properly be considered by me except questions falling under clause (a). I overrule the objection. The quotation " clause (a) " in the petition was merely an inadvertence. The questions raised in the petition were simply whether personal law or custom governed the parties, and if the latter, what the actual custom was, and these questions fall under clause (b). The admitting Judge might have ordered formal amendment of the petition; but I consider that in effect he treated the petition as if it had been amended and that he was quite justified in doing so. The Chief Court Circular referred to only operates to prevent a Judge from taking up under a clause (a) petition, questions falling under clause (b) which are not raised in the petition, or which, if raised, have been, expressly or by implication, overruled at time of admission of petition.

Turning to the merits of the case, I have to decide the two questions stated above. The parties are *Kureshi* of Sialkot city, or rather of a suburb of it called Mianapura, which has a separate record of rights but is practically a part of the city. There can be no doubt that these *Kureshi* do not in all matters follow Muhammadan law. It seems clear from the record that among them daughters do not inherit along with sons, and in one case an adoption, which is quite foreign to that law, was upheld. This being so, Mr. Fazl-i-Husain advertising to my ruling, 14 P. R. 1911 ⁽¹⁾ (*Sayads* of Sialkot city), urges that, in the matter of control by reversioners of alienations, a presumption arises that agricultural custom governs

⁽¹⁾ 14 P. R. 1911 (*Mir Haidur v. Muhammad Ali*).

this tribe of Kureshis. But that ruling is clearly distinguishable. I held, there, that reversioners could control a widow's alienation of house property received from her husband, because the widow had taken on her husband's death not her share by Muhammadan law but the whole property, presumably by way of life interest only. In the present case there is no necessary connection between a special custom whereby daughters have been deprived of the shares, to which under their personal law they would be entitled, and another custom whereby a male proprietor has limited powers of alienation in presence of reversioners. I cannot see that from the existence of the former custom, based upon specific usurpation by the males of the tribes, any presumption arises that those males are themselves deprived of their powers under that personal law, which considering their origin they may be assumed to have once followed in its entirety and, as regards the growing up in the tribe of a practice of adoption, no doubt that practice is unknown to Muhammadan law; but after all what is this so-called adoption? It is simply appointment of an heir and is akin to free and unfettered alienation. It is impossible to deduce from the existence of this practice a theory that the power of alienation is fettered.

It follows then, that plaintiff in this case must prove positively that the tribe follows a custom under which alienations by a male proprietor are controllable by his reversionary heirs. I can find no proof of any such custom. The issue *Law v Custom* was drawn as an open one, *onus* on the parties, and from the evidence all that transpires is that many alienations have taken place and not a single contest regarding them has come to light. Against plaintiffs respondents theory we have also the facts that these *Kureshis* have long since parted with nearly all their land and that they live not by agriculture, but by their priestly functions as *mullahs* and *maulvis*. No custom is proved, and therefore, *cf.* 110 *P. R.* 1906 (F. B.) ⁽¹⁾, personal law must be applied.

Certain rulings have been touched upon in argument, but none of them is in favour of respondents-plaintiffs. They are 45 ⁽²⁾ and 55 *P. R.* 1908 ⁽³⁾, 101 *P. R.* 1902 ⁽⁴⁾ (not 102 as the Courts below have it), and 79 *P. R.* 1909 ⁽⁵⁾ (at p. 307). The first two are *Kureshi* cases in which Muhammadan law was applied

⁽¹⁾ 110 *P. R.* 1906 F. B. (*Daya Ram v. Soheli Singh*).

⁽²⁾ 45 *P. R.* 1908 (*Mussammat Bakht Bano v. Chiragh Shah*).

⁽³⁾ 55 *P. R.* 1908 (*Muhammad Hayat Khan v. Sandhe Khan*).

⁽⁴⁾ 101 *P. R.* 1902 (*Ghulam Shah v. Zain Shah*).

⁽⁵⁾ 79 *P. R.* 1909 (*Sardar Singh v. Maharaj Das*).

and the observations in the other two in no way help respondents.

For these reasons I hold that among the *Kureshis* of Mianapura, district Sialkot, there is no presumption that male proprietors are in the matter of alienations of immoveable property, fettered by the restrictions that apply to ordinary Punjabi agriculturists, and that plaintiffs, on whom the *onus* lay, have failed to establish any special custom involving these restrictions. The appeal is therefore accepted, and the plaintiffs' suit and cross-objections are dismissed with costs throughout.

Appeal accepted.

No 64.

*Before Hon. Sir Arthur Reid, Kt. Chief Judge and Hon.
Mr. Justice Shah Din.*

RAM CHAND—PETITIONER,

Versus

BILLA MAL AND OTHERS—RESPONDENTS.

Civil Revision No. 1967 of 1907.

Insolvency—order under Section 25, Punjab Laws Act, IV of 1872—appeal—revision under Section 70 (1) (b), Punjab Courts Act, XVIII of 1884—concealment of account books—order under Section 28, Punjab Laws Act, not open to revision.

Held, that no appeal lies from an order by the Judge of the Insolvency Court under Section 25, Punjab Laws Act.

65 P. R. 1882, (1) 33 P. R. 1883 (2) and 62 P. R. 1886 (3) followed.

Held also, that no revision lies from such an order under Section 70 (1) (b) Punjab Courts Act, inasmuch as it is not a decree.

70 P. R. 1904 (4) and 65 P. R. 1905 (5) followed.

Held also, that Section 25, Punjab Laws Act, is not limited to conduct in contracting debts, but includes *inter alia* concealment of account-books which is gross misconduct in reference to debts.

Held further, that where a transfer has been annulled as fraudulent under Section 26, Punjab Laws Act, the alleged transferee cannot apply to the Chief Court on the revision side instead of filing a suit.

Petition, under Section 70 (a) and (b) of Act, XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of E. Holder, Esquire, Judge, Insolvents' Estates Court, Amritsar, dated 28th August 1907.

Petman and Pestonji Dadabhai, for petitioner.

Shadi Lal and Nand Lal, for respondents.

(1) 65 P. R. 1882 (*Simla Bank v. Tavenor*).

(2) 33 P. R. 1883 (*Thakur Das v. Kedar Nath*).

(3) 62 P. R. 1886 (*Ram Mal v. Laila Singh*).

(4) 70 P. R. 1904 (*Kishore Chand v. Mussammat Nihal Devi*).

(5) 65 P. R. 1905 (*Permanand v. Municipal Committee, Lahore*).

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—This application and Civil Revisions Nos. 2570 of 1907 and 337 of 1910, can be disposed of together. This application was filed under Section 70 (1) (a) of the Courts Act.

1st July 1911.

The learned Judge who issued notice recorded that there was no appeal. Counsel for the petitioner now contends that the order declining to discharge him as an insolvent is a decree and appealable as such. Section 39 of the Courts Act provides for an appeal to this Court from a decree of a Subordinate Judge or District Judge or that of a Divisional Judge only. The Judge of the Insolvency Court did not fill any of these offices, and 65 *P. R.* 1882 (1) 33 *P. R.* 1883 (2) and 62 *P. R.* 1886 (3) are ample authority for holding that no appeal lies from an order under Section 25 of the Punjab Laws Act. The order impugned was passed under that section.

The further contention that an application under Section 70 (1) (b) of the Courts Act lies has no force, an order under Section 25 of the Laws Act not being a decree and Section 70 (1) (b) being applicable to decrees only; 70 *P. R.* 1904 (4) and 65 *P. R.* 1905 (5) are in point. The Counsel for the petitioner then contended that interference under Section (70) (1) (a) was justified, because none of the provisions of rule XXX framed under Section 31 of the Laws Act had been complied with. We concur with the Court below in the conclusion that failure to comply with rule XXX is not a material irregularity.

Counsel for the respondents then contended that the Court below had committed a material irregularity by misrepresenting the facts on the record, in recording that the insolvent admitted that Radha Kishen, refused to receive a note of Rs. 500 offered to him, and in finding without any evidence that strenuous searches had been made for the missing account books. At the end of the vernacular record of Ram Chand's evidence on the 16th of August 1907 we find that he deposed, that he asked Radha Kishen to take a Rs. 500 note and that Radha Kishen's reply was that he would see the next day. We also find on the record that the sheriff reported twice on the 18th December 1906, that he had searched for the account books on three separate days, and we find that the first report was signed by

(1) 65 *P. R.* 1882 (*Simla Bank v. Tarnor*).

(2) 33 *P. R.* 1883 (*Phakur Das v. Kedar Nath*).

(3) 62 *P. R.* 1886 (*Ram Mal v. Latha Singh*).

(4) 70 *P. R.* 1904 (*Kishore Chand v. Mussammât Nihal Devi*).

(5) 65 *P. R.* 1905 (*Parmanand v. Municipal Committee, Lahore*).

the petitioner. We further find that on the 1st of January 1907, the Sheriff reported that he had found seven books. We are unable to find any material irregularity justifying interference. The plea that the burden imposed on the creditor by rule XXX framed under Section 31 of the Laws Act was not discharged and that its discharge was a condition precedent to proceedings against the insolvent under Section 25 of the Laws Act, has no force. The whole of the evidence adduced by the parties was considered and the result of this consideration was that the Court found that petitioner had been guilty of concealment, fraud and other gross misconduct in reference to debts. The contention that Section 25 of the Laws Act applies only to conduct in contracting debts has, in our opinion, no force. The concealment of account books, for instance, interferes with investigation into the genuineness of debts alleged by the insolvent to exist, and false allegations of the existence of debts resulting, or intended to result, in wrongful disposal of the insolvent's property and loss to genuine creditors in gross misconduct in reference to debts. For these reasons the Court below was on the facts found by it, with which we cannot interfere under Section 70 (1) (a), justified in proceeding under Section 25 of the Laws Act.

206 *P. R.* 1889 (1) and 108 *P. R.* 1890 (2) cited by counsel for the petitioner, are inapplicable to the facts of this case. The plea taken in Criminal revisor No. 2570 of 1907 by Beli Ram the alleged creditor has a bearing also on the insolvents' application. The plea is that on the 2nd January 1907 Beli Ram applied to be placed on the list of secured creditors and applied again to the same effect on the 25th of February; that on the 28th February the Court ordered the application to be placed on the record for hearing on the date fixed; that on the 18th April the Court ordered that the application be considered after the termination of the proceedings under Section 25 of the Laws Act, and that if Beli Ram's mortgage be found in those proceedings to be fraudulent order should be passed after hearing the objections that he was a creditor; that the 19th of August was then fixed for hearing; that ten days before that date Beli Ram applied for the summoning of Duni Chand and Tek Chand as witnesses saying that he would himself produce other witnesses; that orders were passed in accordance with the application; that on the 9th of August nothing was done; that on the 10th August proceedings con-

(1) 206 *P. R.* 1889 (*Gurbaksh Singh v. Bela*).

(2) 108 *P. R.* 1890 (*Mula Shah v. Nizam Din*).

tinned in the original case, but that in spite of diet money being paid by Beli Ram for his two witnesses, proceedings terminated without their being examined.

It appears that on the 18th of April 1907 Duni Chand, pleader for other creditors, objected that Beli Ram should establish the validity of his mortgage by a separate suit, and that the Court recorded that reference had already been made to the Chief Court.

Beli Ram took no steps below after the 19th of August 1907, but applied to this Court for revision on the 23rd November 1907. No authority has been cited for the proposition that a person, a transfer of property to whom has been annulled as fraudulent under Section 26 of the Laws Act, can apply to this Court on the revision side instead of filing a suit. The insolvent was at liberty to examine the witnesses, Duni Chand and Tek Chand, and we see no reason to doubt that Beli Ram and the insolvent, whose families are intimate, the first cousin of Beli Ram being betrothed to the grand-niece of the insolvent, have acted in concert in this matter.

For the above reasons, we see no reason for interference and we dismiss the application with costs.

Revision rejected.

No 65.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Chervis.

HAR DIAL AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

KALI RAM AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1049 of 1907.

Custom—Hindu Law—Evidence of karewa after long co-habitation—marriage between a Jhabra Rajput and a Tarkhan woman—validity of.

Held, that when a woman has been living with her alleged husband for a period of nearly 40 years and until his death, marriage may be presumed without precise evidence of the actual karewa.

102 P. R. 1880 ⁽¹⁾, 48 P. R. 1890 ⁽²⁾, 13 P. R. 1898 ⁽³⁾, 50 P. R. 1900 ⁽⁴⁾ and 51 P. R. 1900 ⁽⁵⁾, referred to.

⁽¹⁾ 102 P. R. 1880 (*Haidar Ali v. Sondha*).

⁽²⁾ 48 P. R. 1890 (*Ralla Ram v. Asa Ram*).

⁽³⁾ 13 P. R. 1898 (*Hamira v. Sundar*).

⁽⁴⁾ 50 P. R. 1900 (*Sahib Ditta v. Bela*).

⁽⁵⁾ 51 P. R. 1900 (*Mangal Singh v. Mussammat Chandi*).

Held also, that a marriage between a Jhabra Rajput and a Tharkhan woman is valid and their offspring legitimate.

Lachman Kuar v. Mardan Singh ⁽¹⁾, *Inderun Valungy Pooiy v. Ramasawmy Pandia* ⁽²⁾, 51 P. R. 1900 ⁽³⁾, 72 P. R. 1908 ⁽⁴⁾ and 57 P. R. 1909 ⁽⁵⁾, referred to.

Further appeal from the order of Lala Achhru Ram, Additional Divisional Judge, Hoshiarpur Division, dated the 29th May 1907.

Sundar Das, for appellants.

Sukh Dial, for respondents.

The judgment of the Court was delivered by—

6th April 1911.

JOHNSTONE, J.—This is at first sight a complicated and intricate case in which the Courts below have spent much time and energy in disposing of the large number of issues raised by the first Court. It would serve no useful purpose for us to state in detail all the pleadings and to discuss in detail all the aforesaid issues, for in our opinion the plaintiffs, who are reversionary heirs of Jangi deceased (whose property is in dispute) in the fifth degree, are excluded from succession by his son Partaba (or Partaba) and so have no *locus standi* to sue for possession. This matter is included in issues 4 and 5 which run thus :—

4. Is Partaba legitimate son of Jangi ?

5. If so, can plaintiffs not sue in his presence ?

The first Court found the fourth issue in favour of plaintiffs. That Court does not discuss the question whether Jangi was actually married to Mussammat Gulabi, i. e., went through the ceremony of *chadar andazi*, or whether he and she lived in permanent union, or whether during his life-time Jangi treated Partaba as a son, or whether he was so treated by the *baradri*. After merely mentioning some of the positive evidence on the record as to treatment of Partaba and his mother as son and wife, the Court goes on to discuss the question of the validity of a marriage between a *Rajput* and a *Tarkhan* woman and finds it in favour of the plaintiffs. Then it takes up the matter of the conduct of Partaba after Jangi's death and arrives at the conclusion that the former was not treated then as the latter's lawful son. In the end that Court, after going through all the issues, decided that the sales by Jangi and Mussammat Hiro, widow of Dunun, were void except as regards the sums of

(1) (1886) 1 L. R. 8 All. 143.

(2) (1868) 13 M. I. A. 141.

(3) 51 P. R., 1900 (*Mangal Singh v. Mussammat Chandi*).

(4) 72 P. R. 1908 (*Huria v. Kanhya*).

(5) 57 P. R. 1909 (*Khairu v. Fakir Chand*).

Rs. 1,681 and Rs. 3,345 respectively ; and that the claim of Har Dial, plaintiff, who had acquiesced in the transfers—see finding on issue 13—must fail on this account ; and upon these findings a decree followed for one-third of the land in suit, on payment of certain sums of money, in favour of the other two plaintiffs.

On appeal to the Divisional Court by both parties, the suit was dismissed with costs, plaintiffs' appeal being rejected. This result was arrived at on a consideration solely of the issue whether the aforesaid sales were for consideration and "necessity." This point being found in favour of the vendees, it was unnecessary to consider any other question ; but the Divisional Judge in incidentally dealing with the matter of Partaba's position expressed the opinion guardedly that he was a legitimate son.

Before us, on appeal by the plaintiffs, much stress was laid by respondents upon the legitimacy of Partaba and the consequent exclusion of plaintiffs from succession, and we therefore elected to hear arguments on this point first. The matter being a difficult one, we reserved judgment, and we now proceed to discuss it.

It is not disputed that Partaba is [the son of Jangi and Mussammat Gulabi, or that the lady lived with Jangi as his wife for a period nearer forty than thirty years, in fact, until death. It is idle to expect much precise evidence of the actual *karewa*. Defendants called five witnesses, of whom Partaba obviously can have no knowledge, while Har Dial, plaintiff, as witness denies *karewa*. The other three are Maya, who says nothing on the point, Gopi, who says he *heard* there had been *karewa*, and Hira, who merely remarks that Mussammat Gulabi was a *karewa ki aurat*. But one of plaintiffs' witnesses, Bhochanga, who is decidedly hostile to defendants has to admit that he was actually present at the *karewa*, though he goes on say that Mussammat Gulabi was a mere mistress (*ashnā*), because her first husband was still alive at the time of the *karewa* and even at the time of his standing in the witness-box. We think that this evidence is in all the circumstances sufficient to establish an actual *karewa*, for we cannot see why Bhochanga should have gone out of his way to tell a lie on behalf of Partaba. As to Mussammat Gulabi's first husband being still alive or being alive at the date of the *karewa*, we must doubt the assertion. It has been made by no other witness, and such a point was never taken by plaintiffs, who if it were really true, could not have failed to see how fatal it would be to any pretensions on behalf of Partaba. Even

in appeal here the plaintiffs have not taken the point, nor have they argued it. That we are justified in taking this evidence, coupled with evidence of subsequent conduct, to be noticed shortly, as sufficient to prove the *factum* of marriage, is clear from a perusal of 102 P. R. 1880 ⁽¹⁾, 13 P. R. 1898 ⁽²⁾, 48 P. R. 1890 ⁽³⁾ (remand order), 50 ⁽⁴⁾ and 51 P. R. 1900 ⁽⁵⁾ (where there was no actual *chadar andazi* at all), and other rulings.

Before considering the question of the validity of such a marriage between a *Rajput* and a *Tarkhan* widow, we will explain why we think Jangi always looked upon Mussammat Gulabi as his wife and Partaba as his lawful son, and also why we are of opinion that probably the *baradri* did so too. The indications in favour of defendants are these :—

- (a) The *factum* of *karewa*.
- (b) The thirty-five to forty years' cohabitation of the pair,
- (c) Partaba is married to a *Rajput*

As to the last point there is evidence of it and there is no rebuttal, and we see no difficulty in accepting the assertion. It is also rather in favour of defendants than otherwise that Partaba was first betrothed to the daughter of one Narain Singh, *Rajput*, who broke the engagement and was in 1890 sued for damages. It is not shown that the breach was due to Partaba's not being considered a *Rajput*—presumably, on the contrary, at betrothal Narain Singh must have considered Partaba one of the *baradri* or he would not have promised his daughter to him.

To these indications we should add the following :—

- (d) It is asserted and not denied that Partaba did Jangi's *kirya karm*.
- (e) In a previous suit by Har Dial, plaintiff, a pedigree-table put in by him shows Partaba as son of Jangi.
- (f) After death of Jangi a suit was brought against Partaba for a debt due by Jangi and a decree was obtained.

⁽¹⁾ 102 P. R. 1880 (*Haidar Ali v. Sondha*).

⁽²⁾ 13 P. R. 1898 (*Hamina v. Sundar*).

⁽³⁾ 48 P. R. 1890 (*Ralla Ram v. Asa Ram*).

⁽⁴⁾ 50 P. R. 1900 (*Sahit Ditta v. Bela*).

⁽⁵⁾ 51 P. R. 1900 (*Mangal Singh v. Mussammat Chandi*).

- (g) In the Revenue Records Partaba is shown as son of Jangi in respect of 5 *ghumaos* of land of Jangi's.
- (h) In Exhibit D. 8, dated 6th June 1889, Jangi described Partaba as his son.
- (i) In two bonds of 1899 and 1903, respectively, Har Dial, plaintiff, attested, though Partaba is described as son of Jangi.
- (f) In the deed of gift of 18th May 1895 Jangi calls Partaba his son.

These indications are of varying value, and no doubt several of them taken individually do not prove much; but in our opinion taken together they do sufficiently shew that Jangi looked upon Partaba as his lawful son, and that Har Dial, plaintiff, also did so. It may also be taken that the *baradri*, one of whom gave his daughter to Partaba, held the same view at that time at least.

It is, of course, argued on the other side that the conduct of Partaba after Jangi's death is against the theory of his legitimacy, and this argument has evidently been accepted by the first Court. We, however, see little force in it. Mutation took place after Jangi's death in 1899. Partaba claimed, out of the land in Jangi's name, only 12 *ghumaos*, included in the gift of 18th May 1895, whereas much more land was in Jangi's name. It is said that this shows that he did not consider himself legitimate son of Jangi. Further, when the whole was mutated in favour of Mussammatt Hiro, and Partaba became aware of the sale to Hukman, he accepted a perpetual lease of 5 *ghumaos* and waived his right to the 12 *ghumaos*. But all this is easily explained. Though the whole land was at Jangi's death still in his name, all but the aforesaid 12 *ghumaos* had been sold by him on 18th May 1895 and thus Partaba, while stoutly asserting at mutation that he was both *donee* and *heir*, did not ask for more than the 12 *ghumaos* really available. [Mr. Sukh Dial has explained to us quite satisfactorily how it came about that the vendees of 1895 had not up to Jangi's death got mutation.] And then again, when Partaba had to decide what steps he should take as to the 12 *ghumaos*, he naturally accepted the compromise of a perpetual lease of 5 *ghumaos* on easy terms in preference to a law suit for the larger area of 12 *ghumaos*, which land was under mortgage, to one

Prabh Dial, who would have to be paid off. In short, Partaba's conduct by no means shews that he knew he was not a legitimate son of Jangi. On the contrary, he seems to have got as much as could be expected from the wreck of the estate and he never departed from his assertion that he was lawful heir of Jangi.

We now come to the question of the legitimacy of Partaba under Hindu Law, and we begin by premising that the Courts should, and generally do, lean in cases like the present to a positive answer to this question *cf.* *Lachman Kuar v. Mardan Singh* (1), quoted at p. 74, Tagore Law Lectures, 1878 (2nd edition), and 51 *P. R.*, 1900 (2) and *Inderun Valungpoo v. Ramaswamy Pandia* (3), (quoted at p. 331 of 72 *P. R.*, 1908) (4). Here there is every reason to do so, for we have the *karewa* proved, nearly 40 years' cohabitation proved, appropriate treatment by the father and others of the *baradri* proved, admissions by one of the plaintiffs themselves proved, and Partaba's being allowed to do Jangi's *kirya karm*.

Many authorities have been quoted to us on the state of the Hindu Law on the subject of marriage between Hindus of different main castes or different sub-castes. The first thing we have to decide is whether, in this case of a marriage between a *Jhabra Rajput* and a *Tarkhan* woman, the parties belong to the same main caste or not. No doubt high class *Rajputs* are *Kshatriyas* and a *Tarkhan* is a *Sudra*; but Jangi was a *Jhabra Rajput* and we are inclined to think he was not a *Kshatriya*. The matter must not be dealt with in a pedantic way. We must not say Jangi was a *Rajput*, all *Rajputs* are *Kshatriyas*, therefore Jangi is so also. Reference to page 47 of the Hoshiarpur Gazetteer, 1904, shews that there are 5 classes of *Rajputs*, each class being much subdivided, and we find the *Jhabras* almost lowest in the 5th class; and it is said that even the 4th class (the *Rathis*) are "hardly to be regarded as true *Rajputs* as they practise *karewa*" and do not marry into the higher classes; and there was evidently a similar remark in Burney's Settlement Report—see reference to it at foot of page 336, in 72 *P. R.*, 1908 (4), a judgment we shall have to refer to again. Further, perusal of page 45, Montgomery's Settlement Report of Hoshiarpur, shews that the marriage customs of the higher and lower kinds of *Rajputs* are by no means the same.

(1) (1886) *I. L. R.*, 8 *Al.*, 143.

(2) 51 *P. R.*, 1900 (*Mangal Singh v. Mussammal Chandi*).

(3) (1869) 13 *M. I. A.*, 141.

(4) 72 *P. R.*, 1908 (*Harla v. Kanhya*).

It is well-known, too, that many tribes in India call themselves *Rajputs*, which are, not really so, and which are, like these *Rathis* and *Jhabras* not admitted to intermarriage with real *Rajputs*. Such tribes are not essentially above the Jats, who are certainly *Sudras*.

This being so, all arguments based upon the inadmissibility of marriages between a higher main caste and a lower are really beside the mark; but a few remarks on such marriages may perhaps not be out of place. According to Mayne, 7th edition, paragraphs 88 and 89, such marriages, though allowed by ancient Hindu Law, are "long since obsolete." The *mitakshara* he says, recognised such marriages, but its wording seems to imply that they were dying out. Much the same is said by Gurdas Banerji in Tagore Law Lectures, 1878 (2nd edition), pages 68, 72, 74, the net result being that, notwithstanding the text of Manu, a girl cannot now be taken into a different caste by marriage, in the absence of a special local custom. But the law has been differently stated by authority here in the Punjab, 57 *P.R.*, 1909⁽¹⁾ is a clear and reasoned ruling. It relies upon the ancient Hindu Law and upon *Dicta* in 72 *P. R.*, 1908⁽²⁾, and its net result is that a marriage in the Punjab between a *Minhas Rajput* (a *Kshattriya*) and a *mahajan* woman (a *Vaisya*) is not invalid. It is said in 72 *P. R.*, 1908⁽²⁾, that the "old Aryan customs" survive here more than in other parts of India" and in 57 *P. R.*, 1909⁽¹⁾ that "mixed marriages seem to have become" obsolete rather by custom than by any positive prohibition of personal law." An attempt has been made by the learned counsel for the appellants to show that these two rulings are in conflict, but we can see no conflict of any importance. The earlier ruling was concerned with a marriage between two sub-castes, though some observations about mixed marriages between different main castes were set down. The later case was one of marriage by a man into a main caste next below him.

It is unnecessary to pursue the subject further. It is clear that in the present case the marriage, the *factum* of which may be taken as proved, was between two persons really of the same main caste; that this being so, its validity is obvious, that, even if the husband is recognised as a *Kshattriya*, it is more than doubtful whether here in the Punjab the marriage is really opposed to law. In these circumstances it would be for appellants, see 72 *P. R.*, 1908⁽²⁾, page 334, to prove a

(1) 57 *P. R.*, 1909 (*Khairu v. Fakir Chand*).

(2) 72 *P. R.*, 1908 (*Haria v. Kanhya*).

special custom under which such a marriage would be invalid, and we can find on the record no good evidence to this effect.

The result of these findings is that plaintiffs have no *locus standi* to sue, Partaba being a legitimate son of Jangi excludes them, and their suit for possession of Jangi's estate fails. They do not ask for a declaration as regards reversionary rights after Partaba's death, and we can not consider that question in any case, for there is no proof that Partaba colluded with defendants to injure appellants.

Appeal dismissed.

No. 66.

*Before Hon. Mr. Justice Kensington and
Hon. Mr. Justice Johnstone.*

KARM BAKHSH—(PLAINTIFF)—APPELLANT,

Versus

CHIRAGH DIN AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 461 of 1908.

Custom—will of self-acquired property in favour of some sons to exclusions of another son—validity of, among Arain agriculturists of tahsil Kasur, Lahore District—Riwaj-i-am—onus probandi.

Held, that plaintiff, on whom the *onus probandi* lay, had failed to prove that by custom his father, a Lahore Arain agriculturist, who had become dissatisfied with him and separated from him, giving him his share of the family estate as it then stood, was incompetent to bequeath his remaining estate with its subsequent self acquired accretions to his other sons.

Appeal from the order of Sheikh Mirahn Baksh, Sub-Judge, Lahore, dated the 13th January 1908.

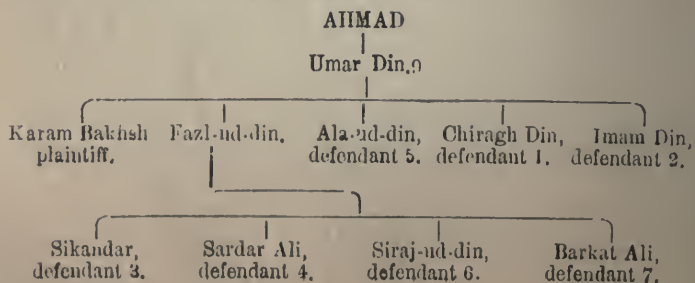
Muhammad Shafi and Sundar Das, for appellant.

Shadi Lal and Bhagwan Das, for respondents.

The judgment of the Court was delivered by—

10th April 1911.

JOHNSTONE, J.—The following pedigree-table suffices to show who are the parties contesting this case :—



Plaintiff puts in two lists of property, A. and B. His case was that Umar Din inherited the whole of A. from Ahmad, and purchased B. with cash inherited from Ahmad; that he (plaintiff) is entitled by inheritance to one-fifth of the whole property; that he holds one-fifth of the parcels of property Nos. 1, 2 and 3 in list A, being land and house property in *mauza* Daulewala; that defendants refuse him his share in the remaining property; that he is unable to pay Court-fee on the full value and so limits his claim, as set forth in the plaint, to property valued at Rs. 5,927-8-0.

There was a dispute about valuation of suit, with which we are now not concerned, and then defendants' substantial pleas came under consideration. Briefly stated the defence is, that Ahmad only left some 1,570 *kanals* of land and a *Kotha* of *Kham* masonry; that after his death plaintiff, some 30 years before suit, voluntarily took one-fifth of the parcels of property Nos. 1, 2 and 3 aforesaid (list A) and separated from his father; that thereafter he was entirely separate in estate and business from the family, which went on and earned all the rest of the property by their own exertions; that on the 8th June 1894 Umar Din executed and registered a will, against which plaintiff filed a suit (which failed as premature); and that the will being genuine and valid, plaintiff has already got all he is entitled to.

To these pleas plaintiff replied that by "law and custom" Umar Din was not authorized to make such a will; that the will was executed under undue influence; that the whole of the property was ancestral in the hands of Umar Din; that whether ancestral or not, it could not be willed away from plaintiff without his consent.

The Courts below framed seven issues and arrived at the following findings :—

- (i) All the property in the lists is non-ancestral except parcels 1, 2 and 3 in list A.
- (ii) Umar Din executed the will with free consent and was competent to make such a will.
- (iii) Plaintiff has no rights inasmuch as he received thirty years ago all he was entitled to.

The first point raised by plaintiff in appeal here is that he is entitled to a remand in order that he may produce rebutting evidence as to custom. On examination of the record we find this contention untenable. It is based upon issue 3 as that issue is stated in the judgment, namely :—

Whether Umar Din, father of the plaintiff, made a will, and whether he was competent to do so ?

Onus of proof to lie on the defendants.

On the other hand, in the body of the record issue 3 appears thus—

Whether Umar Din, father of the plaintiff, made the will ?

Onus probandi on the defendants.

And the question of validity of the will is included in issue 5, which stands thus—

Whether the plaintiff is entitled to one-fifth share of the property, etc. ?

Onus probandi on the plaintiff.

It would appear, then that the burden of proving such a will invalid was laid upon plaintiff, the property being found non-ancestral ; and thus section 180, Civil Procedure Code (1882), which is relied upon by the plaintiff, does not help him. He is entitled to reserve his case and to produce rebutting evidence after defendants evidence has been recorded only upon issues the burden of proving which has been laid upon defendant. It seems to us clear that in this connection we must take the issue as it stands in the body of the record and not as it has been transcribed in the judgment.

But plaintiff's Counsel (Mr. Sundar Das, who conducted the case below also) says he was led to believe by the Lower Court that he would be given an opportunity to rebut as regards custom, and, points to his statement of 31st May 1907, p. 46, paper-book and to the Court's refusal on 16th November 1907, of his right; see pp. 73 and 74. But on 31st May 1907 Mr. Sundar Das said nothing about producing evidence as to custom ; he merely said he would produce the remaining evidence "in refutation", a remark that no doubt was taken to refer to issues 3 (as originally framed), 4, 6 and 7. Thus, plaintiff's contention fails all round. If we were of opinion that injustice had really been done in the case as a whole, or that a remand would be likely to alter the decision of the case, we might stretch a point and grant an indulgence ; but as we hold neither of these views, we simply decline and proceed to dispose of the case on the record.

Though the appeal runs into eight paragraphs, one of which is No. 7 just disposed of, it is manifest that the only points

for decision are—what is the nature of the property in suit, ancestral or non-ancestral, and whether the testator had power to make such a will as that of 8th June 1894. The allegation of undue influence has been dropped and the execution of the will has never been denied.

Plaintiff's Counsel has not attempted to show that the property in suit was ancestral in the hands of Umar Din, and we see no reason to differ from the learned Sub-Judge on the point. There is no doubt that the property in suit was actually bought or acquired by Umar Din and the defendants, and there is no evidence whatever that the money paid for it formed any part of the *corpus* of the estate of Ahmad. Property bought by these persons with savings out of the income of Ahmad's estate, or with their own earnings independently of that estate, would not be ancestral; and so the sole question really is whether Umar Din, an Arain of *tahsil* Kasur, had the power by custom to will away self-acquired property to defendant to the exclusion of the plaintiff. No doubt plaintiff in his replication invoked "law," but he has not really relied upon the Muhammadan Law at any stage of the case but upon the record of custom in the *Riwaj-i-am* and elsewhere, and we need not at all consider the question of the parties' personal law.

We begin with two settled propositions, first, that where the power of gift *inter vivos* exists, power to transfer by will is to be presumed until the contrary is proved—48 *P. R.*, 1903 (*F. B.*)⁽¹⁾; and secondly, that "acquired property, whether "moveable or immoveable is ordinarily alienable according to the "will and pleasure of the last full owner"—see paragraph 58, Rattigan's Digest and the authorities thereunder quoted. The Arains, with whom we are here concerned, are agriculturists and have inhabited the Punjab from ancient times, and the presumptions set forth above certainly govern questions arising among them.

To rebut these presumptions Mr. Sundar Das refers us to 52 *P. R.*, 1895⁽²⁾, a case of Muhammadans following their personal law, and so useless to us here; and 17 *P. R.*, 1886⁽³⁾, which we shall discuss presently. Then we have the *Riwaj-i-am*, extracts from which have been inserted at pages 6 to 8 of the paper-book. The first extract, paragraph 136, is obscurely worded, and the instance in support is a peculiar one, not really

(1) 48 *P. R.*, 1903, *F. B.* (*Mussammatal Bano v. Fatch Khan*).

(2) 52 *P. R.*, 1895 (*Hafiz Karim Baksh v. Mussammatal Begum Jan*).

(3) 17 *P. R.*, 1886 (*Badr-u-din v. Jila*).

in point here. The next extract, paragraph 159, says property, ancestral and acquired, shall be divided in equal shares; that alienation cannot be made to a stranger in presence of collaterals; but that any one heir can be disinherited *by means of partition*. This is rather in favour of defendants than plaintiff, for here, though no formal partition was made by Umar Din in his life-time, it has been held, and not without good reason, that he did virtually separate off plaintiff, giving him his share of the estate as it then existed. The third extract is irrelevant; but the fourth (paragraph 140) which, however, is supported by no instance, rather favours defendants. It is to the effect that, if a father separates a son, giving him a full share, the son will get no more, even if the estate receives accretions, but if the son gets less than his share on separation, he is entitled to participate like any other son. Here there is every reason to believe plaintiff did get his full share at the moment. The last extract is also much in favour of defendants, inasmuch as it says that Arains assert that a proprietor is competent to disinherit any heir he likes *at the time of partition*.

The net result of the records of custom seems to us to be that much is left to an Arain proprietor. The words *at time of partition* and *by means of partition* need not, in the absence of instances to give them precision, be taken too literally; the general impression is that an Arain proprietor can, if he indicates his settled resolve by some unmistakable act, which would practically always be the separation off of a son by giving him what he is entitled to at the moment, exclude him from further participation in the family estate. No doubt in the present instance Umar Din did not have mutation effected in favour of plaintiff of the 25 *ghumaos* odd which he gave to him; but the intention that this should be a permanent and final transfer to plaintiff is fairly clear from plaintiff's having had exclusive possession of that land ever since. Incidents such as the expenditure thereafter of money by Umar Din on marriage in plaintiff's family do not seem to us to upset this theory.

Lastly, we have to consider 17 *P. R.*, 1886 (1). That was a case of cis-Ravi Arains, *tahsil* Chunian. After an enquiry it was found that acquired and ancestral property are on the same footing as regards alienations and when a proprietor has adult sons, he cannot alienate except for necessity without

(1) 17 *P. R.*, 1886 (*Badr-ud-din v. Jita*).

consulting them. There is an important distinction between that case and the present that there the alienation was a mortgage to strangers in the presence of objecting sons.

The case does not meet the presumptions that arise in the present case as stated above. The *dictum* in the ruling is expressed in very general terms, but its application must be limited to cases of alienation to a stranger in the presence of adult sons. It cannot be properly applied to the case of a Lahore Arain, who, having become dissatisfied with a son, separates him off, giving him his share of the family estate as it stands, and then wills his remaining estate with its subsequent accretions to his other sons.

That plaintiff did not in any way assist in the acquisition of the properties got after he was virtually separated off, seems to us clear enough. The will is explicit on the point (see pages 8 to 11 of the paper-book), and the matter is really set at rest by the Chief Court judgment of 27th March 1906 in Civil Appeal No. 368 of 1903. These acquisitions were the subject of much litigation in which Umar Din had to defend his title at great expense, and in this litigation plaintiff does not seem to have helped him in any way.

We have not thought it necessary to hear Mr. Shadi Lal for the defendant. We dismiss the appeal with costs.

Appeal dismissed.

No. 67.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Chevis.

THE DELHI WOOLLEN MILLS COMPANY, LIMITED,
DELHI—(PLAINTIFF)—APPELLANT,

Versus

DURGA PERSHAD AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 890 of 1909.

Companies in liquidation—Contributories—liability of, under section 151, Indian Companies Act, VI of 1882, in regard to unpaid calls made before winding up.

Held, that the contributions due under section 151 of the Indian Companies Act, 1882, include unpaid calls made before the winding up as well as calls made after the winding up.

Sorabji Jamsetji v. Ishwardas Jagjiwandas Store (1), followed.

(1) (1896) I. L. R. 20 Bom. 654.

First appeal from the order of J. Addison, Esquire, District Judge, Delhi, dated 19th July 1909.

Shadi Lal, for appellant.

Lal Chand, for respondents.

The judgment of the Court was delivered by—

28th March 1911.

CHEVIS, J.—In this case the Official Liquidator of the Delhi Woollen Mills Company, moved the District Judge to take action for the recovery of Rs. 7,082-12-9 due by the firm of Durga Parshad and Surat Ram as balance of the price of shares purchased. Liability was denied and issues were framed, but as the learned Divisional Judge had held in a similar case (see the case of Liquidators v. Seth Kanhiya Lal, decided on appeal by Divisional Judge, on 6th July 1909, and before this Court as further appeal No. 880 of 1909) that such a claim could be enforced only by regular suit and not by summary action under the Indian Companies Act, the District Judge bowed to the decision of the Divisional Judge and dismissed these proceedings.

The Official Liquidator appeals to this Court. The appeal is practically an appeal from the decision of the Divisional Judge above referred to.

Preliminary objections were at first raised on behalf of the respondents that Durga Parshad and Surat Ram had long been dead and that notice of appeal had not been given within three weeks of the District Judge's order as required by section 169 of the Indian Companies Act but these objections were withdrawn on its being pointed out that the defendants had been sued in the name of the firm (see order XXX, rule (1) of the Civil Procedure Code) and that the order of this Court extending the period of three weeks had been passed before the said period had expired.

The Divisional Judge's judgment deals with only two sections of the Indian Companies Act. He points out that the Company had made a call before it went into liquidation and he finds that that call not having been answered by payment, the sum due was a debt; that section 149 refers only to property which the Company has made over to a person as trustee and not to property which has never come into the hands of the Company but is due to the Company as a debt; that section 151 empowers the Court to call on contributories but he holds that this section refers only to original calls "and cannot refer to calls which have been made by the Company and have expired before the winding up."

The learned counsel for the appellant has referred us to sections 149, 150, 151 and 152. Section 152 may in our opinion be dismissed from consideration at once, as this section only empowers the Court to direct payment by a different method, *viz.* payment into a Bank instead of to the liquidator direct; in other words the section adds nothing to the number of cases in which payment may be ordered, but merely provides an alternative method of payment.

The liability of share-holders in the event of a Company being wound up is dealt with in section 61 of the Act.

Section 124 defines the term "contributory" and section 125 lays down that the liability of any person to "contribute to the assets of a company under this Act in the event of the same being wound up shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made for enforcing such liability."

When the Company in question was wound up a list of contributories was settled (*vide* section 147), and that defendants were included in the list is not disputed before us.

Section 149 empowers the Court to require any contributory, trustee etc., to pay, deliver etc., to the Official Liquidator any sum or balance etc., *which happen to be in his hands for the time being* and to which the Company is *prima facie* entitled.

We agree with the learned Divisional Judge that this section relates only to property of the Company in the hands of individuals, and not to mere claims for sums due on account of purchase of shares; such sums are, no doubt, claimable as debts but have never come into the hands of the Company, and cannot be described fitly as money which happens to be in the hands of the debtor for the time being.

Section 150 deals with payment of any debts due to the Company exclusive of any moneys which a contributory may be liable to contribute by virtue of any call made or to be made by the Court. This seems to us clearly to exclude money due as the price of shares and liable to be called up as such,

Section 151, however, clearly provides for calls by the Court, which may be made on contributories to the extent of their liability for payment of all or any sums the Court deems necessary to satisfy the debts and liabilities of the Company and the costs and charges and expenses of winding up the Company.

This read with section 61, which lays down that every member is liable to contribute to the assets of the Company to an amount sufficient for payment of its debts and liabilities, subject (see clause (d)) in the case of a Company limited by shares to a limit not exceeding the amount, if any, unpaid on the shares in respect of which he is liable, seems to us clearly to meet the present case. The Divisional Judge would apparently have held the same but for his finding that this section only refers to original calls, and not to calls made by the Company before it was wound up and repeated by the Court after the winding up. The learned Counsel for the respondents supports this finding and urges that a second call for the same money cannot be made but he is unable to quote any authority in support of his argument and he owns that there are no words in section 151 to which he can point as indicating that the section refers only to original calls.

On the contrary we note that, as remarked in *Sorabji Jamsetji v. Ishwardas Jugjiwandas Store* (1), the Master of the Rolls, in the case "*In re Whitehouse & Co.*" (2) pointed out that section 38 of the English Companies Act of 1862 (corresponding to section 61 of the Indian Companies Act) creates a new liability as regards the shareholders, and held that the contribution due under the section includes unpaid calls made before the winding up as well as those made after the winding up. "It is true" he said, "that a call made before a winding up is a debt due to the Company but that does not affect the liability to contribute." We are unable therefore to concur with the learned Divisional Judge and we are of opinion that the case is fully covered by section 151.

Counsel for respondents also argues that a call should not be made before the debts and liabilities have been ascertained, to which appellants' counsel replies that the debts and liabilities have been ascertained. All that section 151 says is that the Court may make calls for payment of all or any sums it deems necessary to satisfy the debts and liabilities. But it is sufficient to say that the case has been dismissed by the District Judge solely on the finding that the proper method of proceeding against the respondents is by regular suit and that finding we reverse.

(1) (1896) *I. L. R.* 20 *Bom.* 654.

(2) 9 *Ch. D.* 595.

We therefore accept the appeal and setting aside the District Judge's order, we return the case to him for disposal on the merits.

Costs in this Court will be costs in the cause.

Appeal accepted.

— — —
No. 68.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

LACHHMAN—(PLAINTIFF)—APPELLANT,

Versus

**BHAGWAN SAHAI AND ANOTHER—(DEFENDANTS)
—RESPONDENTS.**

Civil Appeal No. 70 of 1910.

Custom—Succession to gifted land on death of donee sonless—daughters' succession—reversion to donor.

Held that in the absence of proof of a special custom daughters of the donee, who has died sonless, succeed in the same way as sons, and that they pass on the succession to their children, the land reverting to the donor's line only in the event of the total extinction of descendants of the donee.

84 P. R. 1909 (1), followed.

Further appeal from the order of H. A. Rose, Esquire, Divisional Judge, Amballa Division, dated the 20th November 1909.

Dwarka Das, for appellant.

Devi Dyal, for respondents.

The judgment of the Court was delivered by—

CHEVIS, J.—Plaintiff and his aunt gifted the land in suit 25th April 1911.
to Shibba, who has now gifted it to his son-in-law Bhagwan Sahai. Plaintiff claiming to be the next heir on the death of Shibba, sues for a declaration that the gift shall not affect his rights. Plaintiff is not a collateral of Shibba, but Shibba is sonless, and plaintiff claims that the land will revert to him on Shibba's death. The first Court gave plaintiff a decree, but the learned Divisional Judge, quoting 84 P. R. 1909 (1), held that plaintiff would not succeed so long as any direct descendants of Shibba, either male or female were alive, and dismissed the suit holding that plaintiffs' chance of succession in the presence of Shibba's five daughters and three grandsons was too remote to entitle him to a decree.

(1) 84 P. R. 1909 (*Gurdit Singh v. Mussammat Prem Kaur*).

Plaintiff appeals, and on his behalf it is urged that on the death of a donee, the donor will succeed in the absence of descendants in the direct male line to the exclusion of the donee's daughters and their sons. No doubt in a case of contest between collaterals and daughters the *onus* of proving that the daughters or their issue succeed to the exclusion of collaterals rests on the daughters. But plaintiff is not a collateral of the donee, and the case is not one of ordinary inheritance, 84 *P. R.* 1909 (1) is a clear authority for the proposition that the donor and his descendants are not entitled to oust the female descendants of the donee in the direct line. In that judgment it is said "the learned Counsel for the appellant admitted that he could not quote any authority in which it was laid down that when there are daughters, land which has been gifted to her lineal ancestors reverts to the donor's line," and no such authority has been quoted before us. No doubt there are rulings in which it is stated that the donor succeeds in the event of the donee dying soulless, but in none of these cases did the question of the rights of a female descendant of the donee arise, and these rulings cannot therefore be taken to decide that the donor excludes the daughters of the donee. 84 *P. R.* 1909 (1) is a direct ruling in support of the Divisional Judge's decision, and in the absence of any ruling to the contrary we must follow 84 *P. R.* 1909 (1).

Then it is urged that at the most the daughters have only a life interest in such cases, but again no authority is quoted in support of this view, and we are of opinion that no distinction can be drawn between the daughters and the sons of a donee and that both male and female descendants not only hold for their own life-time but also pass the succession on to their children, and that only in the event of the total extinction of descendants of the donee does the land revert to the donors' line. The custom of reversion to the line of the donor is quite a different custom to the succession of collaterals, and we consider that no arguments in support of the proposition that the daughter of a donee has only a life interest can be based on authorities dealing with the case of a collateral. As there are no less than 8 descendants of the donee alive, *viz.*, 5 daughters and 3 grandsons, we agree with the learned Divisional Judge, that the plaintiffs' chance of succession is too remote to justify his obtaining a decree.

(1) 84 *P. R.* 1909 (*Gurdit Singh v. Mussammat Prem Kaur*).

No doubt plaintiff could have succeeded had he proved a special custom applicable to the parties by which the donor would exclude female descendants of the donee, but no such special custom has been proved.

* * * * *

We uphold the decision of the learned Divisional Judge dismissing the suit and dismiss the appeal with costs.

Appeal dismissed.

No. 69.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and
Hon. Mr. Justice Johnstone.*

BADRI PERSHAD—(JUDGMENT-DEBTOR)—APPELLANT,

Versus

FAKIRA AND OTHERS—(DECREE-HOLDERS)—
RESPONDENTS.

Civil Appeal No. 1036 of 1910.

Civil Procedure Code, 1882, section 260—Sale of attached property—strict compliance with terms of section.

Held, that no sale can be ordered under section 260, Civil Procedure Code, 1882, unless the conditions laid down in that section have been strictly complied with, *viz.*, (a) a valid original attachment, (b) application *within* one year of that attachment by decree-holder for sale, and (c) lapse of one year from date of attachment, and that consequently no such order could be made when the decree-holder applied to have the property sold more than a year after its attachment.

Further appeal from the order of Rai Sahib Bhagat Narain Das, Divisional Judge, Hissar Division, dated 29th April 1910.

Shadi Lal, for appellant.

Lajpat Rai, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—This case has had a long and intricate history which, however, it is not necessary for us to detail at length, as we can and must decide it on the simple ground of the meaning and effect of the 3rd paragraph of section 260, Civil Procedure Code (1882). A few particulars, however, are necessary—

4th May 1911.

Litigation began in 1903. On 12th May 1906 this Court passed the decree, which is now the decree in the case and under which defendant judgment-debtor was to close 4 windows (*janglas*) and 2 *jalis* or ventilators, also called *jharokas*, attempts at execution were made, the latest application bearing date, 11th

January 1908. On 10th March 1908 judgment-debtor was ordered to comply with decree by 2nd April 1908, in pain of suffering the penalties of section 260, Civil Procedure Code (1882). The judgment-debtor having said that there were no ventilators or windows liable to be closed, the Court visited the spot, and on 3rd May gave judgment-debtor another month to obey. It having been reported that the order had not been complied with, on 29th June 1908 attachment was ordered under section 260 aforesaid and was effected on 20th July 1908. On 19th April 1909 judgment-debtor applied, saying he lived in Calcutta and not at Bhiwani, where the house is, that he had to the best of his knowledge complied with the decree, and that the attachment should be removed. On 1st May 1909 the Munsif passed an order that none of the openings beyond the gateway need be closed, that the 6 *jalis* must be plastered outside, and not only inside, as had been done, and that the windows must be bricked up and not merely closed by wooden planking inside. The appeal against this order was dismissed on 14th July 1909. On 13th August 1909 decree-holder applied for sale of the house under section 260 aforesaid, and on 6th October 1909 sale was ordered.

Against this order and the appellate order connected with it, dated 29th April 1910, this revision was filed. In the admitting order it was not clearly stated whether the revision was under clause (a) or clause (b) of section 70 (1), Punjab Courts Act; and the office has wrongly treated the case as a further appeal under clause (b). After hearing Counsel we have decided that the case is not an appeal, but a revision under clause (a), the grounds taken being concerned rather with questions of procedure than of law—see Explanation to section 70 and 76 *P. B.* 1903 (1).

Revision under clause (a) is, of course, a matter of discretion; but we think we should interfere in the present case, because, section 260, Civil Procedure Code (1882) containing a highly penal provision of law, has been applied in the case of a valuable property in connection with a decree requiring a good deal of interpretation; because before 1st May 1909 judgment-debtor had certainly done much towards compliance with that decree and may well have entertained doubts as to what more he was to do. No doubt the sale has not yet been carried out; but in our opinion it is more convenient to deal with the 1st Court's irregularities now than to await the completion of a sale, which would have to be set aside.

Among the points taken by Mr. Shadi Lal is this that, inasmuch as the order of attachment was made on 29th June

(1) 76 *P. B.* 1903 (*Coates v. Kashi Ram*).

1908 and was carried out on 20th July 1908, and no application for sale had been made by 20th July 1909, the attachment under 3rd paragraph of section 260 aforesaid ceased to exist. In our opinion this contention is unanswerable, and Mr. Lajpat Rai has been able to raise no intelligible objection against it. It follows that when the sale was ordered on 6th October 1909, no attachment existed; and we have no hesitation in holding that in cases under section 260, Civil Procedure Code (1882), a valid subsisting attachment is an indispensable precedent to a sale under that section. The section is a highly penal one and must be strictly construed. Under it, when sale is ordered, there are conditions that must exist—(a) a valid original attachment, (b) application *within* one year of that attachment by decree-holder for sale, (c) lapse of one year from date of attachment. In the present case there was, when sale was ordered, no attachment subsisting, because of the absence of condition (b). It has also been argued that condition (a) also was wanting; but we need not go into that.

The remaining points taken and argued need not be noticed.

We allow the revision and set aside the order for sale of the house; but in view of the conduct of the petitioner, we direct that the parties do bear their own costs throughout.

Revision accepted.

No. 70.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, Hon. Mr. Justice Kensington and Hon. Mr. Justice Rattigan.

M.—PETITIONER,

Versus

M.—RESPONDENT—AND M. B.—Co-RESPONDENT.

Matrimonial Case No. 3 of 1911.

Divorce—when petitioner has himself been guilty of adultery—Indian Divorce Act, IV of 1869, section 14.

Held, that where the petitioner has during the marriage been guilty of adultery, the Court has discretion to pass a decree in spite of such adultery (*vide* section 14 of the Indian Divorce Act, 1869) and that the Courts are bound by the rules which bind the English Courts under the English Divorce Act.

Held also, following *Wyke v. Wyke* (1), that adultery by the petitioner is, except under very peculiar circumstances, a bar to a decree, but that the circumstances in this case were of a nature to justify the passing of a decree.

Case referred by Major A. A. Irvine, Divisional Judge, Lahore Division, with his No. 1342 of 18th January 1911.

Petitioner, in person.

Shircore, for respondents.

(1) *L. R. 1904, Probate 149,*

The order of the Court was delivered by—

19th May 1911.

SIR ARTHUR REID, C. J.—This is a reference under the Divorce Act by the Divisional Judge of Lahore, who has given the petitioner, the husband, a decree for divorce against his wife. We are satisfied that the respondent, a native Christian, has been living for several years with the co-respondent, a Muhammadan, as his wife and has gone through a Muhammadan form of marriage with him; and we are further satisfied that there has been no connivance between the petitioner and the respondent. The only question for consideration is whether the fact that the petitioner has committed adultery with the respondent's sister is a bar to the decree granted to him. In *Wyke v. Wyke* (1) it was held that adultery by the petitioner was, except under very peculiar circumstances, a bar to a decree. Section 14 of the Divorce Act provides that the Court shall not be bound to pronounce a decree if it finds that the petitioner has, during marriage, been guilty of adultery; but the Court has discretion to pass a decree in spite of such adultery, and is bound by the rules which bind the English Courts under the English Divorce Act. It is true that adultery was committed by the petitioner during marriage, and before he commenced proceedings for a divorce, but, having regard to the fact that the parties are native Christians, to the fact that his wife had left him and was living with a Muhammadan, to the fact that efforts were made apparently by and through Missionaries to recover the respondent from the co-respondent, and to the length of time occupied by these efforts, the circumstances are, in our opinion, of a nature which justifies our confirming the decree and excusing the petitioner's delay in taking proceedings. The decree is confirmed accordingly.

Decree confirmed.

No. 71.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shah Din.

SIRDAR KIRPAL SINGH—(DEFENDANT)—APPELLANT,

Versus

SANT SINGH AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 662 of 1909.

Hindu Law—Joint family—suit by managing members for recovery of a debt, without impleading the other members—Court-fee on appeal, where only question is to whom the amount admittedly due is payable—Court-fees Act, VII of 1870, schedule II, article 17 VI.

(1) *L. R. 1904, Probate 149.*

Plaintiffs, 2 members of a joint Hindu family sued defendant for recovery of Rs. 17,000 principal and Rs. 5,585 interest due on a bond in which the above plaintiffs alone were named as obligers—defendant admitted execution of the bond and liability thereunder but pleaded that the money was due to all the members of the joint family and also that he paid the other members of the family Rs. 10,400 on account. The first Court held that the other members of the joint family were not necessary parties and payments made to them need not be accounted for by plaintiffs and decreed whole amount claimed—defendant appealed to the Chief Court on a Rs. 10 Court-fees stamp alleging that the value for purposes of Court-fee could not be determined.

Held, that as regards the claim to have the decree of the first Court reduced by the payments amounting to Rs. 10,400, the appellant must pay *avulorem* duty, but as regards the claim for a declaration as to who was entitled to receive the balance due, *i.e.*, the plaintiffs only or all the members of the family, a Rs. 10 stamp was sufficient under article 17 VI, schedule II, Court-fees Act.

Held also, following *Kishen Parshad v. Har Narain Singh* (1) that the plaintiffs suing merely on behalf of the family as the alleged managing members of one of the family shops were entitled to bring the suit in their name without making the other members of the family parties to the suit.

Held also, on the same authority that if a contract is made on behalf of a joint Hindu family by the managing members no other member of the family is competent to interfere in that contract or to give receipts in connection therewith.

Held, however, that as defendant in this case was under the impression that he had contracted with all the members of the family and had no notice or reason to believe otherwise, plaintiffs must give credit for the amounts paid to the other members of the family on account.

*Appeal from the order of Mistr Jowala Sahai, District Judge,
Gujranwala District, dated 29th April 1909.*

Shadi Lal, for appellant.

Sukh Dial, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—A preliminary question arises in this appeal 22nd May 1911, with regard to the sufficiency of the Court-fee stamp. Briefly stated, the facts are as follows :—

One Bishen Singh with his four sons Hakim Singh, Sant Singh, Ganesha Singh and Narain Singh formed a joint Hindu family and owned two shops, one at Laddhewala, the other at Mannanwala, both in the Gujranwala District, Bishen Singh died in November 1903, and on the 21st July 1904 Sardar Kirpal Singh (defendant-appellant) executed a bond for Rs. 17,000 nominally in favour of Hakim Singh and Sant Singh. The latter are the only persons who are named in the bond as the

(1) (1910—1911) 15 Cal. W. N. 321, P. C.

obligers, and on the 1st February 1908, Sant Singh and the two sons of Hakim Singh (who had died prior to suit) instituted the present claim which is for recovery of Rs. 21,585-14-3, that is to say, for Rs. 17,000 as principal and Rs. 5,585-14-3 as interest and compound interest. Plaintiffs admit that a sum of Rs. 1,000 was repaid by defendant on 12th *Maghar*, *Sambat* 1962 (26th November 1905) and they give defendant credit for the said amount.

Defendant admitted execution of the bond and liability thereupon, but pleaded (1) that the money had been advanced to him from the joint fund of the family and that plaintiffs were therefore not competent to sue alone for its recovery and that the other members of the joint family (Ganesha Singh and Narain Singh should be impleaded as co-plaintiffs; and (2) that he had paid Ganesha Singh and Narain Singh Rs. 10,400 in all including the Rs. 1,000 admitted by plaintiffs to have been repaid), and that as this payment was made to persons who were members of the joint family, he should be given credit therefor. When examined upon the pleadings, defendant distinctly stated that he still owed over Rs. 9,000 on the bond, and that he was ready to pay that amount "to whomsoever the Court will order" (page 21 of the paper book).

Before issues were drawn, Ganesha Singh and Narain Singh filed an application in Court (on the 20th February 1908) in which they asserted that the money paid to defendant had come from the funds of the joint family, and that as they were equally entitled to it, they should be impleaded as co-plaintiffs. The District Judge practically ignored this application, his order being that it should be "placed on the record."

The case then went to trial upon the following issues:—

"(1) Should all the members of the plaintiffs' joint Hindu family be brought on the record as co-plaintiffs.

"(2) Have any repayments been made by the defendant ?

"(3) Should the repayment made to Ganesha Singh and Narain Singh be looked upon as repayments made to the plaintiffs in satisfaction of the bond in suit.

"(4) What is now due from the defendants ? "

Upon these issues the District Judge found (i) that as the bond was executed exclusively in the names of Hakim Singh and Sant Singh, these persons were entitled to sue in their own names for its enforcement, and that it was unnecessary for them to implead the other members of their family

as co-plaintiffs or as defendants ; (ii) that a total sum of Rs. 10,400 had been paid by defendant to Ganesha Singh and Narain Singh, but (iii) that the defendant was not justified in making these payments to the latter, who had no authority to act as agents of the plaintiffs for this purpose ; and (iv) that the said payments by defendant could not be regarded as payments made to plaintiffs.

The District Judge accordingly granted plaintiffs a decree for the full amount claimed (*viz.*, Rs. 21,585-14-3) with interest at the rate of 12 annas *per cent. per mensem* from the date of suit until realization. He further ordered defendant to pay costs of the suit.

From this decree the defendant has preferred an appeal to this Court and has affixed a court fee stamp of Rs. 10 only upon his memorandum of appeal. To his grounds of appeal the defendant has added the following note :—

“ As the defendant-appellant never denied liability for the debt and even now accepts the decree in the main, only contending that the Court should finally decide as to who is entitled to it, the value for purposes of court-fee cannot be determined as it is a case when he only wants a final declaration as to who is entitled to the money and a stamp of Rs. 10 is sufficient for this portion of the relief.”

We have heard arguments upon this question, but neither counsel has been able to refer us to any authority directly in point and we must accordingly decide it upon principle.

No doubt the grounds of appeal are in the main of the nature of an interpleader, and appellant's chief objection is that the Court has decided the suit without impleading Ganesha Singh and Narain Singh, who also claim to be entitled to the money due on the bond. He points out that the result will be that he has to run the risk of a second suit at the instance of those persons.

This contention is, we think, well founded in part. The defendant has still to pay (in any event) a large sum to the persons who are legally entitled to the bond, and as to this sum he expresses his willingness to pay the said amount to whomsoever the Court may adjudge it to be due. *Pro tanto* he accepts the decree of the District Judge, and the only question that he wants definitely settled is whether the plaintiff or Ganesha Singh and Narain Singh or both jointly, are entitled to the balance. As to this part of his appeal we think his memo. of appeal has been sufficiently stamped with

a court-fee of Rs. 10 (article 17 (6)) of the 2nd schedule to the Court-fees Act). But as regards the sum of Rs. 10,400 which the defendant says he has paid to Ganesha Singh and Narain Singh, the matter is very different. Here defendant asks for the reversal of the decree of the District Judge and credit given to him for this amount. The District Judge has held that the payment of this amount to Ganesha Singh and Narain Singh cannot be regarded as payment to plaintiffs, and it is the object of defendant upon this appeal to show that this finding is wrong and that to that extent the decree of the District Judge must be set aside. This is a relief of which the value can certainly be determined, and we accordingly hold that the plaintiff must pay *ad valorem* duty on the said amount of Rs. 10,400.

Note.—The appellant has made up the deficiency in the Court-fee stamp in accordance with our decision.

In support of his client's appeal Mr. Shadi Lal devoted much time and trouble to establish the facts that the four brothers, Hakim Singh, Sant Singh, Narain Singh and Ganesha Singh constituted a joint Hindu family in every sense of the term; that the whole of their property was still joint, and that the Rs. 17,000 advanced to defendant, within a few months of the death of Bishen Singh, the father of the said four brothers, had come from the joint family funds. A very lengthy and convincing argument was addressed to us in support of these contentions, without interruption on the part of Mr. Sukh Dial, and as Sant Singh (the principal plaintiff) had in the lower Court distinctly asserted that the money in question had been "allotted" to him and Hakim Singh by his father, we were led to infer that the respondents still maintained that the loan to defendant had nothing to do with the joint family. We were, therefore, somewhat surprised when Mr. Sukh Dial, on rising to reply, admitted that the money came from the joint funds and that the plaintiffs would (if successful in this case) have eventually to account to Narain Singh and Ganesha Singh for it. Plaintiffs' position, as now explained, is this:—The family is joint in every respect, and the money advanced to defendant came from the joint family chest; but, though joint, the four brothers have mutually agreed that the two shops, the one at Mannanwala, the other at Laddhewala, shall be carried on independently of each other; that the contract with defendant was made by the Laddhewala shop, of which plaintiffs are alone the managing members, and that, therefore, plaintiffs are alone entitled to sue in respect of that contract and to receive payments in respect thereof from defendant. Mr. Sukh Dial conceded, further, that the suit must be regarded as one by plaintiffs in a representative capacity that is, by them as the Managers of the Laddhewala

branch, suing on behalf of the family. The only points, therefore, in dispute upon this appeal are (1) whether the alleged repayments made by defendant to Narain Singh and Ganesha Singh were actually made; (2) whether the sum of Rs. 1,000 which was admittedly repaid by defendant on the 12th *Maghar Sambat* 1962 was paid directly to Hakim Singh or indirectly to the latter through Ganesha Singh; and (3) if such repayments, if established in fact, can be held to be valid payments, binding upon plaintiffs.

It is, we think, to be regretted that the respondents' position was not made clear at the commencement of the hearing, as considerable time would thereby have been saved and Mr. Shadi Lal spared much trouble.

But the position of plaintiffs has now been made clear and we have consequently to deal only with the above questions, as Mr. Shadi Lal concedes that if plaintiffs are suing merely on behalf of the family, as the alleged Managing members of the Laddhewala shop, they were entitled to bring the suit in their name, without making the other members of the family parties to the suit. Upon this point the ruling of their Lordships of the Privy Council reported in *Kishen Parshad v. Har Narain Singh* (1) is conclusive. Mr. Shadi Lal, however, does not admit that plaintiffs are the Managing members of that shop, or that the contract was made with that shop or distinct from the family as a whole, and in any event, he contends, that defendant had no knowledge of any arrangement *inter se* which may have been made by the members of the family. The learned counsel argues that defendant had always regarded the family as joint in every respect, and that he had no knowledge whatever of the arrangement alleged by plaintiffs, but denied by the two other brothers, Narain Singh and Ganesha Singh.

After full consideration of the evidence upon the record, of the pleadings of the parties and of the arguments of learned Counsel, we have come to the conclusion that defendant has succeeded in his contentions,

* * * * *

The real dispute between the parties is with regard to the third question. Assuming that the repayments were made to Narain Singh and Ganesha Singh, can we hold that plaintiffs are bound thereby? This is a question of some difficulty, but after giving every weight to Mr. Sukh Dial's arguments, we are

(1) (1910:11) 15 *Cal. W. N.* 321, P. C.

of opinion that plaintiffs are bound to acknowledge and give credit for those payments.

From a purely equitable point of view, it would appear unjust to compel defendant to pay plaintiffs sums of money which he has already paid to persons who are jointly entitled with plaintiffs to those monies, and who admit that they have received the same and are ready to account to plaintiffs therefor. But if plaintiffs are legally entitled to recover such sums from defendant, questions of equity cannot be considered as a bar to their claim. The question, then, is whether plaintiffs are in law entitled to ignore those repayments? Mr. Sukh Dial contends that they are so entitled because (a) the contract was upon the face of the bond, made solely with Hakim Singh and Sant Singh, as the Managing members of the Laddhewala shop and (b) the latter alone were entitled to receive payments in respect of that debt. Now it may, we think, be taken as established by the decision of their Lordships of the Privy Council to which we have already referred, that if a contract is made on behalf of a joint Hindu family by the Managing member, no other member of the family is competent to interfere in that contract or to give receipts in connection therewith. Mr. Shadi Lal demurred to this interpretation of their Lordship's judgment, but we think it is sound. But while the principle is clear, its application to the facts of particular cases may not be easy, and every case must necessarily be decided upon its own facts.

In the present case, the crucial question is whether the contract was made by Hakim Singh and Sant Singh as Managing members of the Laddhewala branch, and whether defendant knew that the contract was with the latter only, and not with the joint family? If he did, he had no right to make payments to other members of the family. On the other hand, if he had no reason to believe that the contract was other than a contract with all four of the joint brothers, he was, in our opinion, fully justified (until notified otherwise) in making payments to any one of those four brothers on behalf of the family.*

* * * * *

We accordingly so far accept the appeal that we hold that the defendant is entitled to credit for the sum of Rs. 9,400, (*i. e.*, the Rs. 10,400 *minus* the Rs. 1,000 for which plaintiffs have given defendant credit). Plaintiffs in claiming the sum of Rs. 21,585-14-3 have not only ignored the sum of Rs. 9,400

*[Note.—On the facts this was found in the affirmative—Ed.]

which we find to have been duly repaid, but have claimed interest and compound interest on the principal sum of Rs. 17,000 upon the assumption that the said sum of Rs. 9,400 was not repaid. In view of our findings, not only will the latter sum have to be deducted from the total amount claimed, but a proportionate deduction will have to be made in respect of the interest and compound interest claimed by plaintiffs. This is a matter of account which must be settled by the office in consultation with the parties' counsel. Plaintiffs are clearly entitled to a decree for the balance due from defendant and must be given such relief, together with interest on such sums from the date of institution of suit until realization, at the rate specified in the decree of the District Judge. As regards costs we direct the parties to bear their own throughout the litigation.

Appeal accepted.

No. 72.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon.
Mr. Justice Johnstone.*

TAJA AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

MUSSAMMAT JATTI AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1260 of 1910.

Custom—gift of ancestral land by sonless Muhammadan Jat of mauza Tarag, tahsil Isa Khel, District Mianwali, to wife and daughter—validity of, in presence of collaterals in 5th degree—Riwaj-i-am—value of entries in new and old Riwaj-i-am.

Held, that a gift by a sonless Muhammadan Jat of mauza Tarag, tahsil Isa Khel, District Mianwali, of ancestral land is valid in the presence of collaterals of the 5th degree.

Held also, that the Riwaj-i-am of 1907 presumably represents the custom of 1906 more accurately than a Riwaj-i-am 20 or 30 years older.

*Appeal from the order of E. A. Estcourt, Esquire, Divisional Judge,
Attock Division, dated the 19th July 1910.*

Amar Nath, for appellants.

Gokal Chand, for respondents.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—The sole question for consideration **31st May 1911.** is whether a gift of ancestral land by a sonless Muhammadan Jat of mauza Tarag, tahsil Isa Khel, Mianwali, to his wife and daughter is valid against collaterals in the 5th degree. The daughters subsequently married.

The lower Appellate Court has apparently treated Ali as common ancestor. Ali's son Ahmad being in fact the common ancestor of the donor and the plaintiff appellants, who are consequently in the 5th degree not in the 6th.

Both Courts below found that the gift was valid.

The pleader for the appellants cited no authority and only one instance. In that instance a subordinate Court held that collaterals in the 4th, 5th and 6th degrees inherited in preference to daughters.

The pleader also relied on two extracts from the previous *Riwaj-i-am*, stating that daughters do not take in the presence of near collaterals and that a gift can extend to one-third of the property only—no authority, or instance in support of the latter rule has been cited.

It was further contended that the *Riwaj-i-am* of 1907 did not affect the gift of August 1906, but this contention has in our opinion no force. The *Riwaj-i-am* of 1907 presumably represented the custom of 1906 far more accurately than a *Riwaj-i-am* twenty or thirty years older.

Counsel for the respondents relied on section X answer 11 of the Tribal custom of the District in which all tribes except Syeds are recorded as stating that a father can make a gift of the whole of his property to his daughter otherwise than as her dowry whether he has or has not sons or near kindred without the consent of any one: on a decision in August 8th by a Munsif that gifts by will were looked on with favour in the tribe; on 14 *P. R.* 1903 (1) in which it was held that Awans of the Jalandhar *tahsil* allowed gifts by sonless proprietors to daughters in the presence of collaterals in the 3rd degree; 5 and 86 *P. R.* 1908 (2) (3) in which it was held that collaterals in the 6th and 7th degrees among Chuban Rajputs, Hindu and Muhammadan, did not exclude daughters, and that there was no general rule entitling collaterals, however remote, to exclude daughters.

The Munsiff's case was compromised, and the *P. R.* cases have little bearing on the facts of the case before us.

The *Riwaj-i-am*, however, supports the decrees of the Courts below, and indicates that Muhammadan Jats have adopted the customs of Pathans, who allow gifts to daughters, and section V answer 10 of the *Riwaj-i-am* modifies, in the case of Jats, the

(1) 14 *P. R.* 1903 (*Khairu v. Pattu*).

(2) 5 *P. R.* 1908 (*Abdul Karim v. Sahib Jan*).

(3) 86 *P. R.* 1908 (*Bholi v. Man Singh*).

Pathan rule, that daughters till marriage, exclude collaterals, who inherit up to the 6th generation, in default of such daughters, to the extent that collaterals up to 4 generations only succeed in preference to married daughters and their descendants.

The plaintiff-appellants have, in our opinion, failed to establish their title and to show that the decrees of the Courts below are erroneous.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 73.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Chevis.

BURI—(PLAINTIFF)—PETITIONER,

Versus

MULA SINGH AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Review No. 363 of 1910.

(Civil Appeal No. 1284 of 1909.)

Occupancy rights—mortgages of—in favour of landlord—locus standi of reversioners to impugn the mortgage—Punjab Tenancy Act, XVI of 1887, sections 53 and 56.

Held, that the principles laid down in 24 P. R. 1902 F. B. apply also to mortgages and that a reversioner of an occupancy tenant cannot, therefore, impugn a mortgage of the occupancy rights made by the tenant in favour of his landlord.

31 P. R. 1896 F. B. (1), 89 P. R. 1898 F. B. (2), 65 P. R. 1900 F. B. (3), and 24 P. R. 1902 F. B. (4), referred to.

Petition under order XLVII and section 114 of the new Code of Civil Procedure for review of the order of the Hon'ble Mr. D. C. Johnstone, Judge of the Chief Court of the Punjab, dated the 9th day of May 1910, passed in the appeal case, Mula Singh and another, defendants-appellants, versus Buri, plaintiff-respondent, Hukam Chaud, for petitioner.

Dharm Das Suri, for respondents.

The order of the Court was delivered by—

JOHNSTONE, J.—This is a review petition admitted to a 17th July 1911, hearing by my order of 17th November last. It is necessary first to state exactly the past history of the case.

(1) 31 P. R. 1896 F. B. (*Didaru v. Banna*).

(2) 89 P. R. 1898 F. B. (*Karam Din v. Sharaf Din*).

(3) 65 P. R. 1900 F. B. (*Devi Ditta v. Saudagar Singh*).

(4) 24 P. R. 1902 F. B. (*Nihal Singh v. Khazan Singh*).

Plaintiff Buri, a minor, sued for possession of certain land as occupancy tenant, which he alleged his late father had mortgaged, partly by a mortgage deed of 19th October 1907 for Rs. 1,115, and the rest by another such deed of 21st February 1908 for Rs. 600 to defendant's father, landlord of the land. The possession was claimed without payment of any mortgage money, on the ground of absence of consideration and necessity, or in the alternative on payment of what the Court might consider fairly due.

The pleas were that plaintiff, not being a member of an agricultural tribe, could not maintain the suit, and that both mortgages were for consideration and 'necessity' and both mortgages could not be included in one suit.

Issues based on these three pleas having been drawn up and the evidence in the case having been heard, the first Court proceeded to find—

- (a) that the suit lay as framed ;
- (b) that plaintiff could maintain the suit;
- (c) that of the consideration, Rs. 885 only can be passed as being for consideration and 'necessity.'

Both parties appealed to the Divisional Court, plaintiff again asking for possession without payment of any money, and defendant praying for dismissal of the suit on the grounds that the mortgages were for consideration and 'necessity,' that plaintiff was not 'competent to sue,' that the family is not governed by custom, and so forth.

The lower Appellate Court took up first the question of the plaintiff's title to sue in view of the Tenancy Law in connection with alienations of occupancy rights by tenants to their landlords. That Court, after considering, 31 *P. R.* 1896 F. B. (1), 89 *P. R.* 1898 F. B. (2), and 24 *P. R.* 1902 F. B. (3), and purporting to follow the latest ruling, held that, though the transfer was to the landlord himself, the reversioner was not excluded from suing to contest the last male holder's acts,

It then went on to discuss the deeds, and, without saying anything about the passing of consideration, at least in any clear terms, allowed only Rs. 415 of the whole consideration as a burden on the land.

(1) 31 *P. R.* 1896 F. B. (*Didaru v. Banna*).

(2) 89 *P. R.* 1898 F. B. (*Karam Din v. Sharaf Din*).

(3) 24 *P. R.* 1902 F. B. (*Nihal Singh v. Khazan Singh*).

Defendant appealed to this Court, and in Chambers I held that the rulings were clearly against the plaintiff's right to sue. No point was argued before me except that, because the transfer was to a landlord, the reversioner was barred. In the appeal petition the ground had also been taken that consideration and 'necessity' had been fully established; but, after pondering the judgments and hearing Counsel, I ruled that this question should not be re-opened.

Then an application for review of judgment was filed on behalf of the plaintiff, in which the correctness of the rulings quoted above was impugned as also their applicability to the present case. The plaintiff in that application took up two different positions: first as a reversioner contesting the acts of his predecessor in title and secondly as an heir impugning the mortgages on the same grounds on which the original mortgagor could have impugned them, *i.e.*, the applicants, besides denying the correctness of the rulings and their applicability, was understood by me to contend, first that he had the right to contest the mortgages as being without 'necessity,' and secondly, that, inasmuch as the mortgages were not for full consideration, they were no mortgages at all in the eye of the law, and therefore could be avoided by him. After hearing Mr. Hukam Chand on his application, I passed the order of 17th November 1910, and I admitted the application because I was doubtful whether I had not overlooked or wrongly decided a vital point in the case. In the rulings quoted above the transfer was always a *sale* whereas in the present case the transfers were by way of *mortgage*, and I pointed out that in the case of a sale of occupancy rights, those rights become extinct, whereas in the case of a mortgage of occupancy rights the occupancy rights still exist and the question is whether the reversioner cannot contest the amount of the encumbrance on the principles laid down in 65 P. R., 1900 F. B. (1) and other similar rulings, even though the alienation is to a landlord. It was upon this question that I admitted the review and not upon the question whether the applicant, as heir of the late occupancy tenant, could impugn the mortgages on the ground that for absence of full consideration, they were no mortgages at all. That position had not been taken up by the plaintiff in the Courts below, nor before me in the second appeal and it seemed to me then, as it seems to me also now, that at this stage the applicant should be confined strictly to the question upon which I admitted the review.

(1) 65 P. R., 1900 F. B. (*Devi Ditta v. Saudagar Singh*),

In connection with the question now before us as stated above, we have considered the rulings 31 *P. R.* 1896 F. B. ⁽¹⁾, 89 *P. R.* 1898 F. B. ⁽²⁾, and 24 *P. R.* 1902 F. B. ⁽³⁾. In the first of these rulings I can find nothing to differentiate the case of a sale to a landlord from the case of a mortgage to a landlord. In that ruling there are, as pointed out by Chatterji, J. in 89 *P. R.* 1898 F. B. ⁽²⁾ more passages than one in the judgment of Roe and Rivaz, JJ., which are *obiter dicta*. But, as Mr. Justice Chatterji explained, the real point decided in the earlier case is stated by Frizelle, J., thus—that a tenant has an absolute right of alienation unrestrained by any one if he complies with the provisions of sections 53 and 56 of the Tenancy Act. In the 1898 case these sections had not been complied with and it was, therefore, held that the landlord or the reversioner could come in.

The lower Appellate Court from its brief allusion to the latest ruling quoted by it, *viz.*, 24 *P. R.* 1902 F. B. ⁽³⁾, would seem to have hardly understood that ruling, for there is a clear decision therein to the effect that a sale direct to the landlord of occupancy rights by the occupancy tenant cannot be impugned by the reversioner.

There is no ruling apparently directly dealing with mortgages, but, after considering the matter, I am inclined to the opinion that the same rule applies. If it is open to an occupancy tenant and a landlord, the one to sell outright and the other to purchase outright, the occupancy rights and so to make a clean sweep of all possible claims of a reversioner, it seems to me that it would be illogical to hold that that same occupancy tenant and landlord cannot transfer and accept, respectively, what is after all a mere portion of the proprietary rights. I would also note that section 53 and section 56 of the Tenancy Act apply not only to sales but to gifts and mortgages also, and therefore I cannot find in them anything that helps the applicant.

Mr. Hukam Chand has not only suggested that the rulings just discussed are not applicable to the present case, but also that they are incorrect, but he has not been able to satisfy me that this is so. The rules laid down in them seem to me to be both sound and convenient, and to be in conformity with the intentions of the Legislature.

⁽¹⁾ 31 *P. R.* 1896 F. B. (*Didaru v. Banna*).

⁽²⁾ 89 *P. R.* 1898 F. B. (*Karam Din v. Sharaf Din*).

⁽³⁾ 24 *P. R.* 1902 F. B. (*Nihal Singh v. Khazan Singh*).

For these reasons I would dismiss the application for review with costs,

Application dismissed.

No. 74.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

MUSSAMMAT AKI AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

KUNDAN LAL—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 773 of 1909.

Custom—adoption—validity of, among Bhabra Jains of Kaithal, Karnal district—bequest of co-parcenary property after adoption—Hindu Law.

Held, that among Bhabra Jains of Kaithal in the Karnal district the adoption of a collateral in the 4th degree is valid by custom.

Held also, that the result of an adoption is to make the adopted son a co-parcener with the adoptive father in the joint family property, and that the latter was consequently incompetent to bequeath or devise any part of that property in the presence of the adopted son.

Appeal from the order of Lala Damodar Das, District Judge, Karnal, dated the 31st May 1909.

Dwarka Dass, for appellants.

Lal Chand, Muhammad Shafi and Shadi Lal, for respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—The parties are Bhabra Jains of Kaithal in 8th August 1911. the Karnal district, and plaintiff, Kundan Lal, claims to be entitled to the whole of the very valuable property, moveable and immoveable, left by the late Tulsi Ram, who died on the 19th April 1907. This suit was instituted on the 1st December 1908 and in his plaint, the plaintiff asserts that he was lawfully adopted by the deceased as his son in 1898; that in proof of this adoption, which had been effected according to the custom of the brotherhood, Tulsi Ram executed a deed of adoption on the 8th December 1898 and had the same duly registered; that after Tulsi Ram's death plaintiff came into possession of some of his property, but that part of it was taken possession of by the defendants. Plaintiff therefore seeks to recover possession of the latter property. The persons originally impleaded as defendants were (1) Mussammat Aki, the widow of Tulsi Ram; (2) certain tenants (defendants 2—10), holding under Mussammat Aki; (3) the collaterals of the deceased (defendants 11—18). At a later stage, Balu Ram, minor, the son of Tulsi Ram's

daughter was also impleaded as a defendant as under the terms of the deed executed by Tulsi Ram on the 8th December 1898 part of the property had been bequeathed to any son who might be born of that daughter.

Defendants 2—6 took no active interest in the proceedings and the Court proceeded *ex parte* against them.

The other defendants united in disputing the alleged adoption of plaintiff and further contended that any such adoption was invalid by the custom obtaining among the parties. There was a further contest among the defendants *inter se* as to their respective rights, the collaterals admitting the right of the widow to a life-interest in the property but denying the claims of the daughter's son.

No less than 9 issues were framed and a decision has been given by the District Judge upon each of them. As the case has been presented before us on this appeal, we find it unnecessary to deal specifically with all these points, and we need say no more than that the District Judge found that plaintiff had been duly adopted by Tulsi Ram ; that this adoption was valid by the personal law of the parties, (*i.e.* Hindu Law) and that defendants had failed to prove any customary rule obtaining among them to the contrary ; that the property was ancestral and that therefore it was not competent to the deceased after admitting plaintiff into his family as an adopted son, to gift any part of the property to a future son of his daughter ; that the collateral had no *locus standi* to object to plaintiff's adoption ; and finally that the deceased's widow had been given by plaintiff sufficient property for her maintenance. The District Judge accordingly decreed plaintiff's claim in full with costs against defendants Nos. 11—18, (*i.e.*, the collaterals of the deceased).

From this decree an appeal has been preferred to this Court ostensibly on behalf of the widow, the collaterals and Balu Ram, but Mr. Dwarka Das, who represented all the appellants, informed us that the widow and collaterals were not really contesting the case any further, as they had resigned all claims in favour of the daughter's son, Balu Ram. The latter is, therefore, really the sole contesting appellant. The position now taken up by the latter is that he and Kundan Lal are entitled, under the deed executed by Tulsi Ram on the 8th December 1898, (which, Mr. Dwarka Das insists, must be regarded as a will), to an equal half share in the property. In order to establish this position Mr. Dwarka Das contended (1) that the property was not ancestral and could therefore be alienated by Tulsi Ram as he pleased ; (2) that Kundan Lal had not been

adopted by Tulsi Ram ; (3) that such adoption, even if its *factum* was proved, was invalid by the custom of the parties ; and (4) that in any event, even if the property were held to be ancestral and the adoption were found to be valid, it was competent to Tulsi Ram to devise the property as he did.

It was further urged on behalf of the widow, that certain ornaments that were found in the shops after the death of Tulsi Ram, belonged to the lady as her *Stridhan* (ground No. 12 of the grounds of appeal). This last point may at once be disposed of with the remark that not one word was said about it in the lower Court.

No claim was preferred to the ornaments and as a result no issue was framed upon the subject. It is absurd to urge for the first time in this Court that whatever ornaments were in the shop at the time of Tulsi Ram's death must be regarded as the personal property of the widow. In all probability these ornaments had been taken in pledge by the deceased, but whether they were so taken or not, there is not an iota of evidence to support the plea now raised. Mr. Dwarka Das had to admit that he could not support his contention by anything upon the record and that the claim was one that had never been urged in the lower Court. We, therefore, decline to consider it.

Reverting then to the pleas urged on behalf of Balu Ram, we may at once say that we are on all points in entire accord with the District Judge.

The contention that the property was not ancestral was not urged in the Court below. Plaintiff asserted that the property was ancestral, and Uttam Chand, defendant (who apparently represented the other collaterals), admitted that it was, (p. 74). To a similar effect is the admission of defendant's Pleader, Pandit Hirde Narain (p. 80) and it was upon the objection of this Pleader that Balu Ram was impleaded as a co-defendant. After the latter was impleaded, no objection was taken on his behalf to the effect that the property was not ancestral, and the case went to trial upon the assumption that the property was ancestral. The District Judge was therefore fully justified in assuming for the purposes of his judgment (p. 104, F. 10) that the property was admittedly of that character. Even in their grounds of appeal to this Court, 13 in number, it is not alleged in express terms that the property was not ancestral. In these circumstances we are of opinion that it is too late now for appellants to urge the contrary, and that the property must be taken to be ancestral.

Then as to the *factum* of plaintiff's adoption. The evidence on this point is, we think, conclusive. A number of witnesses, of whom two at least are collaterals of the deceased, have testified to the fact that plaintiff was formally adopted by Tulsi Ram, that sweetmeats (*laddus*) were distributed and that the brotherhood assembled to witness the ceremony. This evidence has been believed by the District Judge, and as it is amply corroborated by the entries in the deceased's *bahis*, by the School Register of Kaithal and lastly by the deed executed by Tulsi Ram on the 8th December 1898, we see no reason for discrediting it. In the deed last referred to Tulsi Ram distinctly asserts that he has adopted Kundan Lal and has duly "performed ceremonies regarding adoption and distributed sweetmeats among the members of the family and brotherhood." There is no question as to the authenticity of this deed—on the contrary, appellant, Balu Ram's whole case is founded upon it,—and it is admitted that it was registered in due course by Tulsi Ram. In face of this evidence, oral and documentary, it is impossible to hold that the adoption did not in fact take place. Then we have a large number of post-cards (exhibits P. 6—p. 23), from which it is evident that Kundan Lal was regarded by Tulsi Ram as a person intimately connected with him and with his business; and the obvious inference from the terms and expressions used is that he was treated as a son by the latter during his life-time.

The *validity* of the adoption is even more clearly proved. Plaintiff was a collateral related in the fourth degree to Tulsi Ram and a large number of witnesses, many of them defendants' own witnesses, have deposed that the adoption of a collateral is valid by the custom obtaining among Bhabra Jains. No doubt, this is the only instance that has occurred among Bhabras of Kaithal, but it must be remembered that there are comparatively few Bhabras in that place, about 7 or 8 families in all. On the other hand, it has been shewn that Bhabras of the neighbouring districts of Ambala and Delhi freely adopt sons, and *primâ facie* there would seem to be no reason why Jains, who are Hindus, though, in some respects, not orthodox Hindus, should not observe a practice which is very common among Hindus. The evidence before us proves beyond all doubt that an adoption of this kind is well recognised by the Bhabra Jains and we hold, therefore, that the validity of plaintiff's adoption has been established.

The last question is whether in view of the facts that the property was ancestral and that plaintiff had been duly adopted

as his son, it was competent to Tulsi Ram to devise part of the ancestral property to his daughter's son? It is to be borne in mind that at the time when the deed was executed (*i.e.*, on the 8th December 1898), Tulsi Ram's daughter had not given birth to a son, and that the appellant, Balu Ram, was not born till about 1904. Long before that date, plaintiff had been adopted by Tulsi Ram and the result of that adoption was (as pointed out in No. 20 P. R., 1897 ⁽¹⁾) to make plaintiff a co-parcener with Tulsi Ram in the joint family property. When he became a co-parcener the appellant, Balu Ram was not in existence and he could not therefore be said to have acquired any right in the property at that time. Moreover, the deed of 1898, which purports to give him a share in the property is (as Mr. Dwarka Das has throughout his argument quite rightly described it) a will, and as such it could only operate from the date of the testator's death. But before the testator died, plaintiff had become a co-parcener with him in the estate and it was therefore incompetent for the testator to bequeath or devise any part of the co-parcenary property in plaintiff's presence, as it would have been for him to do so if a natural son had been born to him. As observed by Mayne in his work on "Hindu Law"—

"A member of an undivided family cannot bequeath even his own share of the joint property because at the moment of death, the right by survivorship is at conflict with the right by devise. Then the title of survivorship, being the prior title, takes precedence to the exclusion of that by devise" (paragraph 417).

Plaintiff contends that in point of fact he was actually adopted prior to the execution of the deed of the 8th December 1898, but in our opinion it is immaterial whether the adoption did or did not precede that deed. In either event it is not denied that the adoption (if it took place, as we hold it did) occurred many years before Balu Ram's birth, and once plaintiff had been adopted, he became entitled to the whole of Tulsi Ram's ancestral property in the absence of any proof that any one else had, prior to plaintiff's adoption, acquired a vested right to any part thereof.

We accordingly agree on all points urged before us with the District Judge and we dismiss this appeal with costs against all the appellants.

Appeal dismissed.

(1) 20 P. R. 1897 (*Kapur Chand v. Narinjan Lal*).

No. 75.

Before Hon. Sir Arthur Reid, Kt. Chief Judge.

GADDU—(PLAINTIFF)—APPELLANT,

Versus

RIJHA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1169 of 1910.

Adhsalidar—Kangra District—status of.

Held, that the plaintiff *adhsalidar* had failed to prove that his *status* was higher than that ascribed to *adhsalidars* in paragraph 58, Lyall's Kangra Settlement Report, and that he was consequently not a full co-proprietor with defendant, the *girth* cultivator.

Appeal from the order of P. Thompson, Esquire, Divisional Judge, Hoshiarpur, dated 24th May 1910.

Sukh Dial, for appellant.

Tek Chand, for respondents.

The judgment of the learned Judge was as follows :—

12th April 1911.

SIR ARTHUR REID, C. J.—The appellant an *adhsalidar* having failed in the Revenue Courts to obtain partition of the land in suit, has sued for a declaration that he is full proprietor and is entitled to retain possession as proprietor.

In paragraph 58 of Lyall's Kangra Settlement Report *adhsali* is defined as implying partnership in payment of revenue, and *sanjhi* as implying partnership in payment of revenue and cultivation.

In 1851 and 1868 *adhsalidar* was recorded as proprietor with the *girth* cultivator and he has admittedly paid half the revenue and taken one-fourth profits ever since he became *adhsalidar* several years after the *girth* obtained possession.

The result of the *adhsalidar* obtaining the decree he seeks will be, that the respondents position will be altered for the worse.

The latter now pays half the revenue and obtains three-fourth profits. He will pay half the revenue and obtain half profits of the whole land, as he will be deprived of half the land. The only authority cited by the learned advocate for the appellant is *Bhagwat Sahai v. Bipin Bihari Mitter* (1) and section 111 of the Land Revenue Act.

In the Calcutta case their Lordships of the Privy Council held that although a *mokarari* lease was in certain contingencies

liable to forfeiture the lessee's title was permanent and the rights incidental to it, must be those attached to it as it existed, including the right to partition, without reference to what might be lost in the future under changed circumstances. A *mokarari* lease conveys a title obviously different from that of an *adhlapidar* who has nothing to do with the cultivation and merely obtains part of the profits as consideration for paying part of the revenue.

Paragraph 58 of the Settlement Report runs—"supposing it can be shown which of the two parties in a holding is the original proprietor, *waris*, then I observe that present native feeling attaches little weight to the claims of the other, *i. e.*, the *adhsali* or *sanjhi*. It presumes that the proprietor admitted him of his own free will to the partnership and can dissolve it when he likes." In the present case it has been amply proved that the *girth* was the original proprietor.

Section 111 of the Revenue Act merely provides that any joint owner of land or joint tenant of an occupancy tenancy may apply for partition.

This does not in my opinion help the appellant who has failed to prove that he is a joint owner or a joint tenant. As remarked by the District Judge he was erroneously recorded as proprietor and that error has at last been corrected.

In the absence of any more authoritative definition of the appellant's *status*, I accept that cited above from the Settlement Report which is usually accepted as a very able and accurate compilation of the Kangra custom and tenures.

The appellant has in my opinion signally failed to prove that he has proprietary rights in the land in suit.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 76.

Before Hon. Sir Arthur Reid, Kt. Chief Judge.

ZIA-UD-DIN—(PLAINTIFF)—APPELLANT,

Versus

GOBIND RAM—(DEFENDANT)—RESPONDENT,

Civil Appeal No. 218 of 1911.

Landlord and tenant—suit in ejectment—notice to quit specified in lease—denial of landlord's title by defendant before suit.

Held, that in a suit by a landlord for ejectment of a tenant no notice of determination of tenancy is necessary, where the defendant has prior to the

suit being brought, denied the plaintiff's title as landlord and the validity of the lease, notwithstanding that the lease specifies such notice.

Haidri Begum v. Nathu ⁽¹⁾, followed.

Further appeal from the order of M. H. Harrison, Esquire, Divisional Judge, Ambala Division, at Ambala, dated the 28th October 1910.

Muhammad Iqbal, for appellant.

Ganpat Rai, for respondent.

The judgment of the learned Judge was as follows :—

19th April 1911.

SIR ARTHUR REID, C. J.—The Lower Appellate Court found in favour of the plaintiff-appellant's title but dismissed the suit and appeal on the ground that the notice specified in the leases found to have been executed, had not been given by the appellant. The latter alleged in his plaint, dated December 2nd, 1902, that his title had been denied by the defendant-respondent on the 1st August 1908. This allegation was not traversed in the written statement, which denied the appellant's title and alleged that the leases had been executed on false pretences.

Under these circumstances further evidence of the denial of title was in my opinion unnecessary and the ruling in *Haidri Begum v. Nathu* ⁽¹⁾ that under the circumstances notice was unnecessary, is directly in point.

I decree the appeal, set aside the decree of the Lower Appellate Court and remand the appeal under Order XLJ, rule 23, of the Code of Civil Procedure, for decision of any other points involved in the second issue framed by the Court of first instance.

Court-fee on the memorandum of appeal here will be refunded and other costs will be costs in the cause.

Appeal accepted.

— — —
No. 77.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, Hon. Mr. Justice Rattigan, and Hon. Mr. Justice Chevis.

P—PETITIONER,

Versus

P—RESPONDENT.

Matrimonial Case No. 8 of 1910.

Divorce—Petition by husband against wife who had a child 330 days after date of last access—proof of adultery—legitimacy of child—Indian Evidence Act, I of 1872, section 112.

⁽¹⁾ (1895) *I. L. R.* 17 *Al.* 45.

Where the husband prayed for a divorce from his wife on the sole ground that the latter had given birth to a child 333 days after last co-habitation between them and the Court found that she had done so 330 days after the last co-habitation and that there was no evidence at all to prove immorality on the part of the wife, or adultery with any particular person—

Held, that there being no inherent impossibility of gestation of 330 or 333 days after co-habitation this fact alone, tho' suspicious, was not conclusive as to the wife's adultery, and that the child must be held to be legitimate having regard to section 112 of the Evidence Act.

Case referred by M. H. Harrison, Esquire, Divisional Judge, Ambala Division, with his No. 2494-G, dated the 8th October 1910, under section 17 of the Indian Divorce Act, 1869.

Balwant Rai, for petitioner.

Grey, for respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—This case comes before us under section 17 22nd April 1911. of the Indian Divorce Act, 1869 for confirmation of the decree of the Divisional Judge of Ambala (acting as the District Judge for the purposes of the Act), dated the 23rd September 1910.

The learned Judge, whose decree for dissolution of the marriage subsisting between the petitioner and the respondent we are asked to confirm has held that the adultery of the respondent with some person unknown is established from the fact that the petitioner, the husband of the respondent, had admittedly had no access to his wife for a period of at least 330 days prior to the birth of a male child. The petitioner admits that he had connection with his wife on the night of the 25th April 1909 and left her the next day, and the wife in her pleadings admits that her husband had no access to her after the 29th April 1909. It is also a fact beyond all dispute that the wife gave birth to a male child on the 25th March 1910. The parties are clearly hostile to each other and we see no reason to distrust these admissions on the ground of collusion. The case has been contested strenuously throughout the proceedings in the Court below and also in this Court, and we are satisfied that the parties are not in league for the purpose of deceiving the Court. We accordingly accept it as an established fact that the husband had no access to his wife after the 29th April 1909 at the latest. The child was born on the 25th March 1910, or some 330 days after the date when the husband, according to the wife, last had access to her. There is absolutely no evidence on the record to prove immorality on the part of the wife or adultery with any parti-

cular person. In his original petition the husband stated the above facts and added that he did not know the name of the alleged adulterer though he had made efforts to discover it. This was apparently not a true statement of the case, as his legal adviser subsequently admitted, that the petitioner had in fact made no efforts to discover the identity of the alleged adulterer. The petition was filed in Court on the 21st May 1910, and the sole ground upon which the Court was asked to infer adultery on the part of the respondent was that "the petitioner could not possibly be the father" of the child who was born on the 25th March 1910. At a later stage the petitioner asked to be allowed to amend his petition, as he had reason to believe that the respondent had committed adultery with one W. Y. Austin, between January and March 1909 or thereabout. The petition was allowed to be amended accordingly and the petitioner endeavoured to substantiate his allegations against the co-respondent but unsuccessfully, and the result was that on the 17th September 1910 the petitioner prayed to be allowed to withdraw all charges against the co-respondent and tendered an apology to the latter for imputations made against him. The Court thereupon dismissed the case as against the co-respondent and directed the petitioner to pay Rs. 500 to him as costs. Before proceeding, we may here observe that the adultery alleged to have been committed by respondent with Mr. Austin is said to have taken place in January, February or March 1909 and that, other considerations apart, the child born on the 25th March 1910 would be even less likely to be the child of that person than of the petitioner, who admits that he had connection with his wife on the 25th April 1909. The case against Mr. Austin having been dismissed as entirely without foundation, the charge of adultery against the respondent rests admittedly on the bare fact that she gave birth to a child 330 days (as she alleges) or 333 days (as petitioner alleges) after the date when petitioner last had access to her. This is the sole ground upon which she is accused of adultery and it is admitted that there is no other evidence to support that charge. The learned District Judge concedes that "a period of gestation of 330 or 333 is not proved to be medically impossible," but he holds nevertheless that adultery is established by reason of certain circumstances which tend to show that the respondent and her mother were not acting *bonâ fide*. These circumstances are as follows:—(1) There was regular correspondence between the wife and husband between April 1909 and March 1910, but not one word is to be found therein as to the wife being pregnant, until

the telegram was despatched on the 25th March 1910 announcing the birth of the child; (2) the birth of the child, had it been conceived in April 1909, should in the ordinary way have taken place in January 1910 but no arrangements were then made for its arrival; (3) the respondent and her mother would hardly have risked a long journey from Bareilly to Simla at a time when the birth of the child was already some six weeks overdue; (4) the Doctor who attended the respondent during her confinement was not informed that gestation was very considerably protracted; on the contrary, he was led to understand that there was nothing abnormal; (5) the answer sent by the respondent (p. 8) to her husband's telegram (p. 7) shows a guilty conscience. We might further add that the evidence of the said Doctor (Mr. Munrowd, Assistant Surgeon) is that the child weighed about 7 lbs. and appeared to be a normal 280 days' child.

These are all facts which throw very considerable doubt upon the honesty and truth of the respondent's assertion that the petitioner is the father of the child. But the question remains whether, in the absence of any other evidence upon the point, we are justified in holding that the child is not the child of the petitioner, simply because it was born 330 or 333 days after he had had access to his wife. Section 112 of the Indian Evidence Act, 1872 provides that "the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be *conclusive proof* that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other *at any time when he could have been begotten.*" In view of this imperative provision of Law, we must assume that the child born on the 25th March 1910 was the legitimate son of the petitioner unless we are satisfied that he *could not possibly have been begotten 330 or 333 days before the date of his birth.* Furthermore, we cannot assume, in the absence of any other evidence, that the respondent has committed adultery, unless it is established that the child born 330 or 333 days after the petitioner and respondent last had access to each other, could not possibly be the child of the petitioner.

Upon this question we must necessarily look for guidance to the views of medical experts, and here we find a very considerable divergence of opinion. Taylor (Medical Jurisprudence

volume 2, pp. 58, 59, 6th edition) sums up the question as follows:—“It will be perceived from the conclusions drawn by Reid that he admits a variation of 23 days, *i.e.*, from 270 days (the shortest period) to 293 days, the longest known to himself from a single intercourse. There appears to be no valid reason why the variation should not be even greater than that which is here assigned, and why the duration of pregnancy might not extend occasionally to 296 and even to 301 days. It is merely a question of individual experience. An accoucheur admitted a variation of 23 days, and who had known gestation to be protracted to the 293rd day after intercourse would hesitate to pronounce a child illegitimate merely because it had been born on the 296th or the 300th day after the possible access of the husband. Duncan places his average from one set of cases at 275 days, and from another set at 278 days, but he allows that gestation may be extended four weeks beyond these limits. Taking the shortest period and adding to it 28 days, this would make a possible extension of gestation to 303 days or 43 weeks and 2 days. *There is no doubt a limit to gestation, but it is not in our power to fix it*; hence we find obstetric writers of repute adopting periods which have no point of agreement among themselves. Some stop short at 280 days; others, like Reid fix the maximum yet known at 293 days. Murphy allows from his experience at least 324 days, and Meigs considers that gestation may be continued to 12 months or 365 days (obstet, the science and the Article 1849, p. 194). *The fact is the term has not yet been fixed even approximately by medical science*; hence in a disputed case, other circumstances must be looked to in order to lead a Court of law to a safe decision. *It is at present hopeless to reconcile the conflicting medical opinions which exist on the subject of duration of pregnancy in the human female. There is indeed only one point on which all modern observers agree, namely, that the period cannot be limited to a certain number of days, but that it is liable to variation according to circumstances but little understood.*”

Wharton and Stills “Medical Jurisprudence,” which is a standard work in the United States of America has the following remarks on this subject:—“If we estimate the duration of the gestation from the last coition, we find six cases referred to in the last named article by Winckel, when the pregnancy lasted more than 300 days after coition. The cases are cited from Schlichting as follows:—

" Days after coition.	Days after menses.	Length in centimetres.	Weight, Grains.
303	300	50	3·650
303	318	48	3·312
312	290	53	3·000
314	214	52	3·650
320	316	54·5	4·000
334	344	55	3·875

" That these cases reported represent the limit to which pregnancy may be protracted is improbable. There seems to be no evident reason why pregnancy should last 334 days after coition, and not be protracted another day. Nor does the limit of protraction after the cessation of the menses seem to be any more strictly limited; this same case of Schlichting exceeding the next longest quoted above by six days. A number of other cases of protraction of pregnancy have been reported, some of them lasting over still longer periods of time, but there seems to be reason for questioning the condition of the woman as to the other factors bearing upon the estimate of the duration. In Tucker's Elements of Midwifery reference is made to two such cases, one lasting 365 days and the other 372 days; and Meigs cites one case of 420 days. Jaffe describes one of 365 days in which the development and measurements corresponded to the length of protraction. Less probable cases have been reported extending over 440 days, 476 days and 500 days. The Legislation of Pennsylvania has sanctioned one year as the longest period of indulgence which the law allows a married woman who has a child in the absence of her husband. If she cannot show that he was in her company or was within the colonies between the eastern most parts of new England and the southern most part of North Carolina within 12 months next before the birth of the child, she is deemed an adulteress under the 4th section of the Act of 1705." The learned authors sum up the conclusions as to the limits of variation as follows:—" From the foregoing facts we can but come to the conclusion that though the normal period of gestation is 275 to 282 days from the end of the last menses or 270 days from a single coition, the pregnancy may be protracted to 334 days after coition or 344 after the menses." From these extracts it is abundantly clear that there is no inherent impossibility of a gestation of 330 or 333 days after coition. The respondent has sworn that her menses ceased about the 23rd April 1909 and reckoning from that, the period of gestation would in

the present case, be 336 days and here again there is no inherent impossibility in the truth of her assertion that the petitioner is the father of her child. As there is admittedly no other evidence in support of the charge of adultery, we must hold that the petitioner has failed to prove that charge which is based simply and solely on the ground that he could not possibly be the father of a child who was born 330—333 days after he last had access to his wife. Under section 112 of the Evidence Act we are bound to assume that this child is legitimate, unless it is proved that it *could not have been begotten* of him. We must, moreover decline to accept as proof *per se* of respondent's adultery the birth of a child after the lapse of that period, unless it is shown that it was inherently impossible for the petitioner to be the father of that child. In view of the medical authorities to which we have referred we cannot hold that there is any such inherent impossibility. We fully admit that the case against the respondent is one of grave suspicion and that the conduct of herself and of her mother is strongly suggestive of *mala fides*. But the fact remains that as the child *may* be the off-spring of the petitioner, we are compelled to hold that it is his child, and that the alleged protracted gestation of the respondent is not a physical impossibility and therefore *in itself* no proof of adultery.

We accordingly refuse to confirm the decree of the District Judge, which is hereby set aside.

In view of respondent's conduct we do not think that the petitioner was without justification in instituting the present proceedings and we therefore leave the parties to bear their own costs in his Court. The petitioner must however, pay the respondent all arrears of alimony *pendente lite*, as ordered by the District Judge up to date.

Confirmation refused.

No. 78.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

MUHAMMAD HUSAIN—(PLAINTIFF)—APPELLANT,

Versus

GHULAM MUHAMMAD AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 179 of 1911.

Custom—Pre-emption—Muhalla Mimaran alias Pansarian, Kaithal—value of proof of uncontested instances and instances in neighbourhood of the muhalla,

Held, that the custom of pre-emption of houses exists in *Muhalla* Mimaran *alias* *Muhalla* Pansarian, a sub-division of Kaithal.

Held also, that instances of pre-emption in the neighbourhood of the *muhalla* in question may indicate the existence of custom of pre-emption in that *muhalla* and that uncontested instances are by no means worthless evidence of the existence of right.

71 P. R. 1905 ⁽¹⁾, 38 P. R. 1906 ⁽²⁾, 99 P. R. 1906 ⁽³⁾, 120 P. R. 1906 ⁽⁴⁾, 67 P. R. 1907 ⁽⁵⁾, 138 P. R. 1907 ⁽⁶⁾, 44 P. R. 1903 ⁽⁷⁾ and 26 P. R. 1907 ⁽⁸⁾, referred to.

Further appeal from the order of M. H. Harrison, Esquire, I. C. S., Divisional Judge, Amballa Division, dated the 24th October 1910.

Dwarka Das, for appellant.

Lal Chand, for respondents.

The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—The facts are stated in the judgment of the Courts below. 28th April 1911.

The house of which pre-emption is sought is situate in *Muhalla* Mimaran, a sub-division of Kaithal, identical with *Muhalla* Pansarian. Kanshi Ram (D. W. 1) admitted that pre-emption of houses obtained in *Muhalla* Pansarian and that his father sued for pre-emption of a house in that *muhalla* and obtained a decree. Bhiku Mal (P. W. 1) corroborated this evidence. Rahim Bakhsh, the purchaser's agent, admitted that Kanshi Ram's father's suit had been decreed, and that the house, which was the subject matter of that suit, was sixty paces from the house now in suit. Jiwan Mal (P. W. 2), defendant in Kanshi Ram's case, supported Kanshi Ram's evidence. Radha Kishen (P. W. 3) deposed that his father sued Narain Das-Balmokand for pre-emption in *Muhalla* Pansarian and got a decree. Abdul Ghani (P. W. 4) deposed that his uncle got a house by decree but did not specify that it was a pre-emptive decree. On the 10th February 1909 a judgment of the District Judge allowing pre-emption of a house in another *muhalla* of Kaithal referred to two cases in *Muhalla* Pansarian. Polu Mal (D. W. 2) deposed that a house situate about 100 paces from that in suit was surrendered to him on his issuing a notice of pre-emption. The sale-deed shows that this house is situate in *Muhalla* Pansarian.

⁽¹⁾ 71 P. R. 1905 (*Jai Devi v. Naubat Rai*).

⁽²⁾ 38 P. R. 1906 (*Dhan Devi v. Kanshi Ram*).

⁽³⁾ 99 P. R. 1906 (*Mamon v. Ghaumsa*).

⁽⁴⁾ 120 P. R. 1906 (*Abdulla Beg v. Walaiti Begam*).

⁽⁵⁾ 67 P. R. 1907 (*Manohar Lal v. Pars Ram*).

⁽⁶⁾ 138 P. R. 1907 (*Allah Ditta v. Raj Kumar*).

⁽⁷⁾ 44 P. R. 1903 (*Muhammad Nawaz Khan v. Musammatal Bobo Sahib*).

⁽⁸⁾ 26 P. R. 1907 (*Than Singh v. Tara Singh*).

The population of Kaithal in 1890 was a little over 14,500.

In 71 P. R. 1905 ⁽¹⁾ it was held that the custom of pre-emption based on vicinage existed in *Muhalla Sheikh Tayyab* of Kaithal, 38 P. R. 1906 ⁽²⁾, 99 P. R. 1906 ⁽³⁾, 120 P. R. 1906 ⁽⁴⁾, 67 P. R. 1907 ⁽⁵⁾ and 138 P. R. 1907 ⁽⁶⁾ are authorities for holding that instances of pre-emption in the neighbourhood of the *muhalla* in question may indicate the existence of custom of pre-emption in that *muhalla* 44 P. R. 1903 ⁽⁷⁾ and 26 P. R. 1907 ⁽⁸⁾ are authorities for holding that uncontested instances are by no means worthless evidence of the existence of right.

The evidence on the record establishes, in my opinion, the existence of a custom of pre-emption of houses in the *muhalla* in suit. I decree the appeal under order XLI, rule 23 of the Code of Civil Procedure, and remand the appeal to the lower Appellate Court for decision of the other points involved. The Court-fee on the memorandum of appeal will be refunded and other costs will be costs in the cause.

No. 79.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

KARM ILAHI AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

SULTAN ALAM AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 13 of 1910.

Jurisdiction—Civil or Revenue Court—suit for declaration that plaintiffs (Malikan Kabza) are not liable to pay Bakri and Thana patti dues, there being no custom under which they are payable—Panjab Tenancy Act, XVI of 1887, section 77 (3) (j).

Held, following 33 P. R. 1908 F. B. ⁽⁹⁾, that a suit brought by Malikan Kabza and non-proprietary residents of a village and owners of the houses occupied by them for a declaration that they were not liable to pay Bakri and Thana patti dues, there being no custom as to the realization of such dues in their district or village, is not cognizable by a Civil Court.

67 P. R. 1905 ⁽¹⁰⁾, distinguished.

⁽¹⁾ 71 P. R. 1905 (*Jai Devi v. Naubat Rai*).

⁽²⁾ 38 P. R. 1906 (*Dhan Devi v. Kanshi Ram*).

⁽³⁾ 99 P. R. 1906 (*Mamon v. Ghaunsa*).

⁽⁴⁾ 120 P. R. 1906 (*Abdulla Beg v. Walaiti Begam*).

⁽⁵⁾ 67 P. R. 1907 (*Manohar Lal v. Pars Ram*).

⁽⁶⁾ 138 P. R. 1907 (*Allah Ditta v. Raj Kumar*).

⁽⁷⁾ 44 P. R. 1903 (*Muhammad Nawaz Khan v. Mussammat Bobo Sahib*).

⁽⁸⁾ 26 P. R. 1907 (*Than Singh v. Tara Singh*).

⁽⁹⁾ 33 P. R. 1908 F. B. (*Gamu v. Karim Khan*).

⁽¹⁰⁾ 67 P. R. 1905 (*Sheikh Muhammad v. Habib Khan*).

*Further appeal from the order of Khan Bahadur Maulvi Inam Ali,
Divisional Judge, Jhelum Division, dated the 1st June 1910.*

Muhammad Shafi, for appellants.

Sakh Dial, for respondents.

The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—The question for consideration is 26th April 1911.
whether the suit is cognizable by a Civil Court. The learned advocate for the respondents does not support the Lower Appellate Court's finding that section 158 (2) (VI) of the Revenue Act bars the suit.

The plaintiffs-appellants alleged that they were *Malikan Kabza* and non-proprietary residents of the village and owners of the houses occupied by them and that there was "no custom" as to realization of *Bakri* and *Thana patti* dues in their district or village and that they were not liable to pay such dues.

The plaintiffs were examined and did not say that although some inhabitants of the village were liable to pay these cesses or dues, they were not. The facts are therefore, distinguishable with those in 67 P. R. 1905 (1) and on all-fours with those of 33 P. R (F. B.) 1908 (2).

The distinction from the general rule in favour of 67 P. R. 1905 (1) drawn by the Full Bench in the 1908 judgment "that although certain cesses were payable, the plaintiffs were not themselves liable to payment by reason of not belonging to classes from which payment could be claimed" does not exist here.

The appeal fails and is dismissed with costs. Counsel's fee Rs. 32 in addition to Rs. 16 payable for the last hearing.

Appeal dismissed.

No. 80.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

GHULAM HUSSAIN—(PLAINTIFF)—APPELLANT,

Versus

GANGA SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 79 of 1911.

Pre-emption—claimed by owner of adjacent shop—Punjab Pre-emption Act, II of 1905, section 13 (1) seventhly—sale of half property in suit and agreement to sell other half not detrimental to pre-emptor's title to a decree.

(1) 67 P. R. 1905 (Sheikh Muhammad v. Habib Khan).

(2) 33 P. R. 1908 F. B. (Gamau v. Karim Khan).

Held, that the words "immovable property" in section 13 (1) *seventhly* of the Punjab Pre-emption Act include a shop.

Held also, that the sale by the plaintiff pre-emptor of half the property in suit and an agreement to sell the other half, does not derogate from his right or disentitle him to a decree.

Further appeal from the order of H. Harcourt, Esquire, Additional Divisional Judge, Amritsar Division, at Sullundur, dated 19th October 1910.

Claim :— For possession by pre-emption of a house situate in Amritsar, *Katra* Bagh Singh, *Kucha* Tarkhanan on payment of Rs. 650.

Sukh Dial, for appellant.

Lajpat Rai, for respondents.

The judgment of the learned Judge was as follows :—

29th April 1911.

SIR ARTHUR REID, C. J.—The Lower Appellate Court has dismissed the suit and set aside the decree in plaintiff-appellant's favour on the ground that "*immovable property*" in section 13 (1) *seventhly* of the Pre-emption Act, does not include a shop.

No authority for this conclusion has been cited, but it has been said that because a shop is excluded from pre-emption, its possession cannot give a right of pre-emption. We have to consider the terms of the Act, not what the terms should have been. Had the intention of the Local Legislatura been to adopt the rule laid down by the Lower Appellate Court it would have been very easy to frame section 13 (2) in such a manner as to convey the intention.

The words "in respect of the sale of" indicate clearly that a shop cannot be acquired by pre-emption, not that the possession of a shop is not a qualification for pre-emption. Had the words "the sale of" been omitted, there would have been force in the Lower Appellate Court's argument. As it is, there is no force in it, and I have no hesitation in holding that "*immovable property*" in section 13 (1) *seventhly* includes a shop.

There is no force in the contention of the Pleader for the respondents that the property in suit was a shop at date of sale or suit, or in the contention that there has been no finding on the question of the existence of a custom of pre-emption. There remains the contention that the plaintiff appellant has lost his right by reason of a sale by him of the property as owner of which he sued for pre-emption after his decree had been set aside by the Lower Appellate Court. He admittedly

sold half the property at the time alleged and executed an agreement to sell the other half.

90 P. R. 1909 (1) at page 344, and 91 P. R. 1909 (2) at pages 431, 441 and 442 are cited for this contention.

The *dicta* relied on go no further than that a pre-emptor may lose "his so called right" because he has himself parted with the property, by reason of the possession of which he claimed the right, or because the original vendee has transferred the property claimed to a person who has rights of pre-emption in respect thereof, either equal or superior to those of the claimed.

These *dicta* do not go far enough for the contention that sale by the pre-emptor of half the property in suit and an agreement to sell the other half, derogate from his right or disentitle him to a decree, and no other authority has been cited.

The plaintiff-respondent is still owner of property entitling him to a decree for pre-emption and the possibility that he may after obtaining a final decree, cease to be owner of that property does not destroy his right. It is quite possible that the sale may not be completed.

No other defence to the suit has been pleaded.

For these reasons I decree the appeal and restore the decree of the Court of first instance with costs.

Appeal accepted.

No. 81.

Before Hon. Mr. Justice Johnstone.

FATEH DIN AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

NIKKA AND ANOTHER—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 1056 of 1910.

Limitation—suit for land, which fell to plaintiff's share on partition—adverse possession—Punjab Land Revenue Act, XVII of 1887, section 122

Held, that when partition of land takes place and a particular field allotted to B. remains in possession of A., the latter holds adverse possession from date of partition. B. can during the first 3 years apply to the Revenue Court under section 122, Punjab Land Revenue Act to be put in possession and during the following 9 years sue for possession in a Civil Court.

(1) 90 P. R. 1909 F. B. (*Sanwal Das v. Gur Parshad*).

(2) 91 P. R. 1909 F. B. (*Dhanna Singh v. Gurbakhsh Singh*).

Further appeal from the order of Khan Bahadur Khan Abdul Ghafur Khan, Khan of Zaida, Divisional Judge, Siulkot Division, dated the 27th June 1910.

Zia-ud-Din, for appellants.

Dani Chaud, for respondents.

The judgment of the learned Judge was as follows :—

5th June 1911.

JOHNSTONE, J.—In this case it appears that a partition of the *shamilat* took place on 10th September 1896. The two fields Nos. 280 and 293 fell to the share of the plaintiffs upon that partition, but they never succeeded in getting possession and they filed their present suit on 5th October 1909, *i. e.*, more than twelve years after the partition was confirmed. The first Court discriminated between the two *khasra* numbers. It held that in regard to field No. 280 the relation of landlord and tenant subsisted between the parties and that therefore no suit with regard to that number was cognizable by a Civil Court, and then it went on to dismiss the claim as regards *khasra* No. 293 on the ground of limitation. The plaintiffs appealed as regards both numbers to the Divisional Judge, who accepted the appeal reversed the lower Court's decree and gave plaintiffs a decree for possession of both numbers. The Divisional Judge's idea seems to have been that the defendants, though they remained in possession of the land after partition, must be taken to be tenants-at-will as recorded in the revenue paper and that the plaintiffs, because they have been paying the land revenue, have asserted their ownership and have been constructively in possession. Now, in my opinion, if the Divisional Judge's view was correct that the relation of landlord and tenant existed between the parties, then the suit would not have been cognizable by a Civil Court at all. But it is unnecessary to pursue this matter, for in reality plaintiffs have not shown in any way that they have had possession, constructive or otherwise. When a partition of land takes place and a particular field is allotted to B. which remains in possession of A., in my opinion from the date of partition A. begins to hold adversely against B., and B. must, if he wishes to preserve his rights, take action within the time allowed by law. In the case of land coming under the Land Revenue Act of 1837 the remedy for the plaintiff in such a case is at any time during the first three years to apply under section 122 of the Land Revenue Act to the Revenue Court to be put in possession of the field which has been allotted to him, or thereafter, some time during the following nine years, to bring a suit in the Civil Court for possession. In the present case the plaintiffs have

done neither of these things and therefore in my opinion the suit is barred by time.

The appeal is accordingly accepted and the plaintiffs' suit dismissed with costs throughout.

Appeal accepted.

No. 82.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.
Mr. Justice Kensington.*

MIR UMAR ALI AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

MUSSAMMAT NASIB-UN-NISA—(PLAINTIFF)—RES-
PONDENT.

Civil Appeal No. 801 of 1910.

*Decree (preliminary)—meaning of—Civil Procedure Code, Act V of 1908,
section 2 (2)—appeal—revision.*

Held, that in the definition of "decree" in section 2 (2) of the Civil Procedure Code of 1908 the words "rights of the parties" must be taken to be the rights of the parties *inter se* in regard to the subject matter of the suit and that preliminary orders passed upon :—

- (a) an objection, as to part of the suit, based upon the terms of the Pension Act ;
- (b) a question as to how that portion of the claim dealing with profits is to be determined ;
- (c) a demand by defendant that security should be taken from plaintiff before the case proceeds further ; and
- (d) an allegation by the defendant that the total Court-fee stamp now required from plaintiff is largely deficient ;

are consequently not decrees and not appealable.

Held also, that as an appeal will lie from the decree in the suit, the Court must decline to interfere with the orders on revision.

146 P. R. 1908 (1), distinguished.

Miscellaneous appeal from the order of Bhai Umrao Singh, District Judge, Rohtak, dated the 5th July 1910.

Shadi Lal, for appellants.

Muhammad Shafi, for respondents.

The judgment of the Court was delivered by—

KENSINGTON, J.—This is an appeal from two intermediate orders passed by the District Judge of Rohtak on the 20th June

17th June 1911.

(1) 146 P. R. 1908 (*Siri Dhar v. Amar Nath*).

and 5th July 1910 on a series of preliminary objections raised by the defendant at an early stage in the trial of a Civil suit covering property of large value.

The plaint was originally stamped with a Court-fee of Rs. 1,015. By the orders under appeal the plaintiff has been required to pay a sum of Rs. 160 more, making her total Court-fee Rs. 1,175, representing a valuation for jurisdictional purposes of Rs. 40,000 to Rs. 50,000. The objections raised by the defendant were numerous, but they have not all been pressed in this Court. The appellant has selected 5 points upon which the appeal is based, and the last of these has been given up by Counsel at the hearing, as having been framed inadvertently, without reference to the alteration made by order III, rule 2 (2) of the Civil Procedure Code to the provisions as to powers-of-attorney in the corresponding section 37 (a) in the Code of 1882. We have, therefore, to deal with four points, raised with reference to—

- (1) an objection as to part of the suit based upon the terms of the Pensions Act ;
- (2) a question as to how that portion of the claim dealing with profits is to be determined ;
- (3) a demand by the defendant that security should be taken from the plaintiff before the case proceeds further ; and
- (4) an allegation by the defendant that the total Court-fee stamp now required from the plaintiff is largely deficient.

Counsel for the defendant explains that he considered himself bound to lodge this appeal, in case it should hereafter be held that the decision of the District Judge on all or any of these points amounts to a preliminary decree within the meaning of section 2 (2) of the present Code of Civil Procedure. It is pointed out that the definition of decree as now given differs materially from that contained in section 2 of the 1882 Code, and Counsel represents that if any part of the District Judge's order amounts to a preliminary decree his client will by section 97 be precluded from questioning the correctness of the order unless an immediate appeal is preferred.

We have, therefore, to consider the points specified above with special reference to the terms of section 2 (2) of the Code in which a "decree" is defined as meaning "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties

"with regard to all or any of the matters in controversy in the "suit." Counsel for the plaintiff at once raised the preliminary objection that none of the points stated amounts to a decree as so defined, and that in consequence no appeal lies at the present stage. It was urged by him that the orders under appeal do not conclusively determine the rights of the parties on any point, being concerned entirely with matters of procedure.

Counsel for the defendant could say little in reply to this contention, which appears to us to be obviously correct in regard to at any rate the last 3 out of 4 points stated. He did however refer to a portion of the commentary on the new Code of Civil Procedure by Woodroffe and Amear Ali, at page 42, which deals more particularly with the new definition of a decree. We think that where the definition speaks of the rights of the parties, the meaning must be taken to be the rights of the parties *inter se* in regard to the subject matter of the suit. We cannot allow that an interlocutory order passed by a Court on any objection raised by the defendant, however frivolous, should be taken as coming within the definition of a decree and therefore justifying an immediate appeal to a higher Court. If the very extended interpretation of the word 'decree' which Counsel for the defendant desires us to take, should be permissible, a defendant will practically be always able to block a suit indefinitely by objections similar in character to those taken in the present suit, and it is difficult to see how the trial of important suits is to be conducted without inordinate delays. We do not suppose, that this could have been the intention of the Legislature when framing the present definition of 'decree' and we decline to adopt the interpretation suggested to us. We are satisfied that the orders now passed by the District Judge do not touch the essential merits of the case between the parties.

They deal with questions which are within the discretion of the Court by which the case is being tried, or with matters which lie between the plaintiff and the Government. On no single point has there been an adjudication which conclusively determines the rights of the defendant. Our finding is therefore, that the orders in question do not amount, to a preliminary decree and that no appeal lies to this Court at the present stage.

Counsel for the defendant then pressed us to deal with the questions on revision quoting as his authority the ruling No. 146 P. R. 1908 (1), in which a Division Bench of this Court passed

(1) 146 P. R. 1908 (*Siri Dhar v. Amar Nath*).

orders on revision on a question affecting the valuation of a suit for the purposes of Court-fee. We have no difficulty in distinguishing the ruling quoted. The case was then before this Court with reference to an erroneous order passed not by the first Court but by a Lower Appellate Court. The Munsif had declined jurisdiction and the Lower Appellate Court had improperly held the suit to be within the jurisdiction of the Munsif. The circumstances under which this Court felt bound to interfere on revision are entirely different from the circumstances under which the present case is now before us. We are quite clear that no appeal lies, and that we have no right to interfere on revision in the present case. An appeal will lie from the decree in the suit, and the defendant is seeking to anticipate such remedy as he may eventually have by appeal when the case is finally decided. We cannot prejudice the plaintiff by attempting to determine beforehand whether the defendant will eventually have or will require any such remedy.

The petition is accordingly dismissed whether it is treated as one of appeal or one for revision. We allow Rs. 80 costs in this Court to the plaintiff.

Plaintiff's Counsel has asked us to take notice of the manner in which the trial of the suit has been blocked by defendant's persistent objections, proceedings having been stayed in this Court since the 4th August 1910. We agree that the attitude taken up by the defendant is for the most part indefensible, and we trust that the District Judge will now be able to proceed with the trial of the suit on the merits without further dilatory tactics on the part of the defendant. It will be part of the duty of the District Judge to endeavour to secure that definite issues are now drawn with as little further delay as possible.

Appeal rejected.

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No. 83.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Chervis.

DAN SINGH AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

**PHANGAN SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.**

Civil Appeal No. 836 of 1909.

Pre-emption—fraudulent over-statement of sale price—how far binding in successful pre-emptor in suit by heirs of vendor, to have sale set aside for

want of consideration and necessity—when actual price paid nearly approximates market value of property sold, Courts decline to change sale into mortgage.

A sold certain land for Rs. 4,000. B sued for pre-emption alleging that the real price paid was Rs. 3,000. The Court found that this was so and decreed the claim on payment of Rs. 3,240, the ascertained market value. The sons of A then sued for recovery of the land on the ground that the sale by their father was neither for consideration nor for necessity. The Lower Appellate Court held that B, the pre-emptor, stood in the shoes of the original vendee and must accept the fact that the sale was put down for a consideration of Rs. 4,000 and finding that only Rs. 3,000 was actually paid and for necessity decreed the claim on payment of that amount.

Held, that though a pre-emptor who obtains a decree becomes in many respects identified in interest with the original vendee, he cannot be held a *particeps criminis* in a fraud perpetrated by the vendee, which he himself brought to light and succeeded in frustrating, and that B was not therefore debarred from urging in the present case that the sale, though ostensibly for Rs. 4,000, was in fact merely for Rs. 3,000.

Held also, that as the sale was for Rs. 3,000 and that amount was for necessity and fairly represented the market value, there was no reason for converting the sale into a mere mortgage and that the suit must consequently be dismissed.

8 P. R. 1908 ⁽¹⁾ and 27 P. R. 1909 ⁽²⁾, referred to.

Further appeal from the order of T. P. Ellis, Esquire, Additional Divisional Judge, Ferozepore Division, dated the 15th June 1909.

Ram Bhaj Datta, for appellants.

Duoi Chand, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The facts of the case, so far as they are material for the purposes of the two connected appeals before us, are as follows :—

By deed of sale, dated the 2nd July 1895, and duly registered, two brothers, Bui Singh and Dhal Singh, sold some 245 *kanals* of ancestral land in *manza* Bagha Purana, Moga *tahsil*, to one Sarup Singh (father of defendants 2—4) for an alleged consideration of Rs. 4,000. This sum, according to the deed of sale, was made up of the following items, *viz.* :—

- (a) Rs. 2,200 paid to a creditor, Santu Singh, who held a mortgage, with possession of the land for that amount ;
- (b) Rs. 1,000 paid before sale to the vendors ;
- (c) Rs. 800 paid to the vendors before the Sub-Registrar.

⁽¹⁾ 8 P. R. 1908 (*Wadhawa Mal v. Wadhawa*).

⁽²⁾ 27 P. R. 1909 (*Kesar v. Sunder Singh*).

15th July 1911,

Defendants Nos. 5—11, near collaterals of the vendors, forthwith instituted a suit for pre-emption of the said land, their claim being based on the ground that they were proprietors in the village, whereas one of the vendees' owned no land at all therein and the other was a mere *malik-i-qabza*. In this suit for pre-emption the claimants contended that the sale price was really Rs. 3,000 and that the item of Rs. 1,000 had not been paid, but had been entered solely for the purpose of defeating their rights. The Court found that the price stated in the sale deed had not been fixed in good faith and that the market value of the property was Rs. 3,240. A decree was accordingly passed in favour of the pre-emptors, on the 17th December 1896, for possession by pre-emption on payment of the said sum of Rs. 3,240. The pre-emptors paid this sum to the vendee and obtained possession of the land, mutation in their favour being effected in 1897. Thereafter they sold part of the land to defendants Nos. 12—24.

Dhul Singh, one of the original vendors, died in 1900, and Bur Singh, the other vendor, is still alive. In 1908 the two sons of Dhul Singh, Sundar Singh and Ghamand Singh, instituted a suit for recovery of the land from defendants on the ground that the sale by their father was neither for consideration nor for necessity, and about the same time the sons of Bur Singh instituted a suit for a declaratory decree to the effect that the sale effected by their father would not affect their reversionary rights, on the death of the latter, for the same reason. Both suits were tried and decided together, as the questions involved were the same in each of them.

The Sub-Judge found that the sale in 1895 was for consideration and necessity; that the present claim by plaintiffs was within time, but that their long silence amounted to acquiescence. In accordance with these findings he dismissed their suits with costs.

It is not quite easy to follow the judgment of the Sub-Judge, but his meaning would appear to be that the original sale was really for Rs. 3,000 and that as the vendee had paid that amount, the mere fact that the actual market value of the land was Rs. 3,240 did not justify him in converting the sale into a mortgage, as against the present defendants (the pre-emptors and their alienees). As he points out, the latter were not responsible "for the overstatement in the sale-deed" (*i. e.* to say, the allegation therein that the consideration was Rs. 4,000) and the principle laid down in No. 8 P. R. 1908 (1) applied to the facts of this case.

The learned Divisional Judge upon plaintiffs' appeals held that the sale of 1895 was alleged to be for a consideration of Rs. 4,000; that the present contesting defendants, who stood in the shoes of the vendee, had to accept the fact that the consideration was put down at that figure, while on the other hand they could not in face of their pleas in the pre-emption suit be now allowed to assert that the said amount was actually paid to the vendors; and that the sum of Rs. 1,000 must, therefore, be held not to be a charge on the land. He agreed with the Sub-Judge that the suits were within time, but he disagreed from the latter's finding that the plaintiffs had acquiesced in the sales. He accordingly accepted the appeals in both cases and granted the plaintiffs "decrees for possession and declaration, respectively, on payment by each of Rs. 1,500."

From these decrees the defendants have preferred further appeals and in this judgment we shall dispose of both appeals.

We see no reason to differ from the concurrent views of the Lower Courts upon the question of limitation, and we hold with them, that the suits are within time. For reasons which will presently appear, we find it unnecessary to deal with the plea of acquiescence, though there is, in our opinion, something to be said on both sides upon this point.

Upon the merits of the case, we think the claims preferred by the sons of the vendors must fail. It was established in the pre-emption suit that the sale in 1895 to Sarup Singh was for Rs. 3,000 only, and in the present suits both Courts are agreed that the said sum was actually paid to the vendors and that there was "necessity" *pro tanto*.

Now the present contesting defendants were the pre-emptors in the former suit, and in that suit they contended, and with success, that the item of Rs. 1,000 formed no true part of the consideration money for the sale. They pleaded, and proved, that the consideration was Rs. 3,000 only, and it is clear from the judgment of the Sub Judge (and the reference in that judgment to No. 8 P. R. 1908 (1)) that they have in the present suits again raised the contention that the sale was merely for that amount. In these circumstances it would, we think, be unjust to hold (as the Divisional Judge has held) that the defendants stand entirely in the place of the vendees and if the vendees committed a fraud, they are equally bound by it. The defendants have from the outset protested against this fraud on the part of the vendees and in their suit for pre-emption they strenuously asserted that the item of Rs. 1,000

(1) 8 P. R. 1908 (*Wadhawa Mal v. Wadhawa*).

had been fraudulently stated in the sale deed to be part of the consideration for the sale. They succeeded in establishing that plea, and their reward now is to be informed that they have stepped into the shoes of the vendees and are therefore, bound by the very fraud which they succeeded in frustrating. In many respects a pre-emptor who obtains a decree becomes identified in interest with the original vendee, but we have no hesitation in saying that it would be contrary to all notions of equity and justice and repugnant to common sense to carry this principle to the length of holding that a pre-emptor was bound in circumstances, such as we have before us, as *particeps criminis* with the vendee in the fraud which it has been his object to bring to light. The principle *nemo allegans suam turpitudinem audiri potest* may possibly debar the vendee himself from urging, in a case such as the present, that the sale which was ostensibly for Rs. 4,000 was in fact merely for Rs. 3,000 and that an item of Rs. 1,000 had been entered fictitiously and for the purpose of keeping off pre-emptors (No. 27 P. R. 1909 ⁽¹⁾). We confess to some feeling of doubt as to how far this principle can legitimately be carried in such cases, and there is authority for the view that it is open even to the vendee to raise the plea that a certain item of the alleged consideration should be disregarded when the Court has to decide whether full consideration was actually paid for the property sold (*Devi Chand v. Gurcharn Singh* ⁽²⁾). But be this as it may, we are of opinion that the principle cannot in reason and in justice be extended in order to debar a person who has, as pre-emptor, successfully asserted that part of the alleged consideration was fraudulently entered in the deed of sale, from thereafter maintaining that the true consideration for the sale was the amount actually found to have been paid by the vendee. In the present case the Courts are all agreed that the actual amount paid by the original vendee was Rs. 3,000 (*viz.*, Rs. 2,200 paid to the mortgagee, Santu Singh, and Rs. 800 paid to the vendors before the Sub-Registrar) and that there was "necessity" for the alienation to that extent. This is a concurrent finding on a question of fact, but apart from this, we are ourselves fully satisfied upon the point. It has also been found, and we see no reason whatever to doubt the accuracy of the finding, that the market value of the property is about Rs. 3,247. This finding was arrived at in the pre-emption suit to which plaintiffs were no parties, and the latter are therefore technically

⁽¹⁾ 27 P. R. 1909 (*Kesar v. Sundar Singh*).

⁽²⁾ 127 P. L. R. 1906.

not bound by it. But it was arrived at after very full enquiry in a case which was hotly contested by the original vendee and the pre-emptors, and it would be a useless waste of time and entail unprofitable expenditure, if we remanded the case for further inquiry upon this point. In this connection we may note that plaintiffs in their grounds of appeal in the Lower Appellate Court did not challenge the finding of the Sub-Judge (based upon the finding in the pre-emption suit) that the market value of the land was Rs. 3,240. We may take it, therefore, for the purposes of this case that in 1895 the market value of the land was about Rs. 3,240. That being so, we find that a sum of Rs. 3,000 was actually paid to the vendors and as the latter sum fairly represents the real value of the land, we do not feel called upon to convert the sale into a mere mortgage (No. 8 P. R. 1908) ⁽¹⁾.

We hold accordingly that the plaintiffs have failed to prove that the sale in 1895 (which was really for Rs. 3,000) was invalid as against defendants on the ground that consideration did not pass, or that necessity did not exist *pro tanto*.

The appeals are therefore accepted and plaintiffs' suits dismissed with costs throughout.

Appeals accepted.

No. 84.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Chevis.

**SHAH MUHAMMAD AND OTHERS—(PLAINTIFFS)—
APPELLANTS,**

Versus

PIARA MAL AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 90 of 1908

Pre-emption—Limitation—where vendee has transferred bargain to another person who is not made a party till after expiry of period of limitation—when Appellate Court justified in declining to go into point of limitation—observations as to belated pleas of limitation.

Held, following 25 P. R. 1903 ⁽²⁾, that where, previous to the institution of a suit for pre-emption, the vendee has resold the land to another person and the latter is not made a party to the suit until after the expiration of the period of limitation, the suit is barred.

Held also, where limitation has not been pleaded in the first Court nor taken in the grounds of appeal, but only in argument and the plea for its

⁽¹⁾ 8 P. R. 1908 (*Wadhawa Mal v. Wadhawa*).

⁽²⁾ 25 P. R. 1903 (*Nabi Bakhsh v. Fakir*).

proper decision involved further enquiry into facts, the Appellate Court was justified in refusing to entertain it.

Observations as to how Courts should treat belated pleas of limitation.

Balaram v. Mangta Dass ⁽¹⁾, *Ahmad Ali v. Waris Hussain* ⁽²⁾, *Dattu v. Kasai* ⁽³⁾ and *Venkata N. Naidu v. Bhashyakarl Naidu* ⁽⁴⁾, referred to.

Further appeal from the order of C. H. Atkins, Esquire, Divisional Judge, Ferozepore Division, dated the 24th October 1907.

Fazal-i-Hussain, for appellants.

Lal Chand, for respondents.

The judgment of the Court was delivered by—

29th July 1911.

JOHNSTONE, J.—This is a suit for possession by pre-emption of 10 *biswansis* of land out of village Abohar, *tahsil* Fazilka. The facts are that Piara Mal sold his share in the village to Hira Singh and others on 4th August 1905 by a registered deed for Rs. 2,900. Before any body brought a suit these vendees resold this land to Daulat Ram by a sale deed, dated 16th July 1906 for Rs. 4,000. Three sets of persons brought pre-emption suits, first Sundar Singh, whom we will call A as the Divisional Judge does, who filed his suit on 25th July 1906; second Rup Singh and others, B, who sued on 1st August 1906; and third Shah Muhammad, C, who sued on 3rd August 1906, C, impleaded Daulat Ram in his plaint from the beginning, but the other two sets of plaintiffs did not do so until 23rd August *i. e.*, more than a year after the date of the sale. A claimed to purchase the land for Rs. 1,300, B for Rs. 2,900, and C for Rs. 1,900. First Court framed issues and came to the following conclusions:—

- (1) Daulat Ram is not entitled to pre-emption under Section 11 of the Pre-emption Act;
- (2) A, B and C are all members of agricultural tribe and have the right of pre-emption, but C comes only under clause (e) of Section 12, while A and B come under clause (c) of that section; and further, A, as being a co-sharer in part of the land in suit, comes also under clause (b); and
- (3) the price mentioned in the deed was not fixed or paid in good faith, and that the market value is Rs. 2,300.

⁽¹⁾ (1907) *I. L. R.* 34 *Cal.* 941, *F. B.*

⁽²⁾ (1893) *I. L. R.* 15 *All.* 123.

⁽³⁾ (1884) *I. L. R.* 8 *Bom.* 535.

⁽⁴⁾ (1902) *I. L. R.* 25 *Mad.* 367.

A decree was accordingly given in favour of A for possession on payment of Rs. 2,300 *minus* a certain sum already paid in by him and the costs of the case.

Four persons appealed to the learned Divisional Judge, *viz.*, A, B, C and Daulat Ram. That Court held that A and B had equal rights and that the rights of C were inferior to both. It therefore gave a joint decree in shares to A and B and a subsidiary decree to C to be brought into operation should either A or B fail in taking up the bargain. The price arrived at by the learned Divisional Judge was Rs. 2,900 chiefly it would seem because A and B made a sort of compromise with Daulat Ram to the effect that Rs. 2,900 should be the figure.

The present appeal is by C alone and two points are raised : first, that the suits of A and B are both barred by time under section 22 of Act XV of 1877 on the ground that Daulat Ram, second vendee, was added as a defendant in both those suits after the expiry of one year from the date of sale; and, secondly, that the price, Rs. 2,900, was not fixed in good faith and that the market value of the land is less than Rs. 2,300 which should be taken as the proper price.

We have heard ingenious arguments on both sides regarding the point of limitation and there is a good deal to be said for the appellants' contention, 25 *P. R.* 1903 ⁽¹⁾ seems to be in point. But out of the many arguments laid before us by Mr. Lal Chand for the respondents, with most of which we do not agree at all, there is one which, we think, has great force, *viz.*, that the plea of limitation was taken too late. It was taken in argument before the learned Divisional Judge, who refused to entertain it, quoting *Dattu v. Kasai* ⁽²⁾ and *Ahmad Ali v. Waris Husain* ⁽³⁾. In our opinion the law regarding the consideration of questions of limitation by Courts may be stated in general terms as follows. In the original Court if a plea of limitation is taken before issues are fixed, it must, of course, be entertained and decided. If it is taken by the defendant at a later stage, and if it can be decided on the existing issues and on the record as it stands, here again the Court is bound to take note of it and to decide it. And this rule holds good whether the plea has been actually taken or not, if the matter has in any way come to the notice of the Court. But if, after the issues in the case have been fixed and the case has proceeded to some length, a defendant raises the question of

(1) 25 *P. R.* 1903 (*Nabi Baksh v. Fakir Muhammad*).

(2) (1884) *I. L. R.* 8 *Bom.* 525.

(3) (1893) *I. L. R.* 15 *All.* 123.

limitation and the Court sees that, in order to decide that question, fresh issues of fact have to be gone into and additional evidence taken, then the Court has the option of refusing to entertain the plea. When a case has passed out of the original Court and is before a Court of appeal, the rule probably remains much the same; but there is some conflict of authority as to whether in an Appellate Court, and certainly in a second Appellate Court, it is incumbent on the Judge to listen to a plea of limitation, even though it can be decided without any further inquiry. No doubt in 99 cases out of 100 it would be right for an Appellate Court in the latter case to entertain the plea, but we conceive that there would probably be an option. We need not expatiate on all these different propositions, nor need we discuss at length the various rulings from which we extract these rules. It seems to us a reasonable view and to be reasonably in accordance with *Balaram v. Mangta Dass* ⁽¹⁾ a case tried by a special Bench of six Judges; *Ahmad Ali v. Waris Hussain* ⁽²⁾, *Dattu v. Kasai* ⁽³⁾ and *Venkata N. Naidu v. Bhashyakarl Naidu* ⁽⁴⁾. These rulings are not all exactly in accord, but there is no serious conflict, as the facts are different in each of the cases; and in the present instance we do not propose to lay down *all* the above propositions as the final views of this Court, for here obviously the point of limitation cannot be decided without going into fresh facts, and therefore only a limited question arises for decision. The plea based upon 25 P. R. 1903 ⁽⁵⁾ can only be concurred in by this Court if it is shown that the sale to Daulat Ram was a genuine sale. Appellants themselves made rather ambiguous statements on this subject. They talked, in their plaint and in their pleas in the cross suit, about the sale to Daulat Ram being made '*farzi taur par*' and '*farzi wa na jaiz*'; and even though we admit the correctness of their present explanation that they did not intend to intimate that the sale was entirely fictitious, but merely that it was a dishonest sale intended to defeat them and containing an inflated price, yet we cannot lose sight of the fact that the opposite party always insisted that the sale was fictitious. Mr. Fazl-i-Hussain has tried to show us that the sale, from the circumstances and the history of the case, could not have been fictitious, and no doubt there are very strong indications

⁽¹⁾ (1907) I. L. R. 34 Cal. 941, F. B.

⁽²⁾ (1893) I. L. R. 15 All. 123.

⁽³⁾ (1884) I. L. R. 8 Bom. 535.

⁽⁴⁾ (1902) I. L. R. 25 Mad. 367.

⁽⁵⁾ 25 P. R. 1903 (*Nabi Bakhsh v. Fokir Muhammad*).

to this effect. But no issue was fixed upon the point, and the opposite party has certainly a right to make an attempt to prove their allegation. This being so it seems to us that this plea of limitation, for its proper decision, does involve further inquiry into facts, and, therefore, in our opinion, taken as it was, not in the First Court, nor in the grounds of appeal in the second Court, but only in argument in that Court, it was taken too late, and the Divisional Judge was correct in refusing to entertain it. This is not one of those cases in which there is any equity in favour of the appellant. A and B have undoubtedly a claim to pre-empt which is superior to that of C, and we can see no reason for straining the law in favour of the appellants simply because A and B were misled, or perhaps deceived, by sudden resale to Daulat Ram within a few days of the expiry of the period of limitation for the suit.

These things being so it is not necessary for us to decide the matter of market value. For these reasons we dismiss this appeal, but make no order as to costs.

Appeal rejected.

No. 85.

*Before Hon. Mr. Justice Kensington and Hon. Mr.
Justice Johnstone.*

MIR AMAN-ULLAH AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

ABDUL GHAFUR AND ANOTHER—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 1207 of 1909.

Insolvency—appeal from order under section 25, Punjab Laws Act, IV of 1872—proper time for order of discharge, section 29 ibid.

Held, that no appeal lies from an order under section 25, Punjab Laws Act, unless the order amounts to a decree—62 P. R. 1886 (1) followed.

Held also, that no definite finding or order as to an insolvent's right to discharge should be made until the administration of the estate has been completed (*vide* section 29 *ibid*).

First appeal from the order of Rai Bahadur Lala Ohuni Lal, Judge, Insolvents Estates Court, at Amritsar, dated the 30th August 1909.

Fazal-i-Hussain, for appellants.

Duni Chand, for respondents.

(1) 62 P. R. 1886 (*Ram Lal v. Ladha Singh*).

The judgment of the Court was delivered by—

26th October 1911.

JOHNSTONE, J.—This was an insolvency case under Act IV of 1872, sections 22 *et seq.* It is unnecessary for the purposes of this appeal to discuss the facts in great detail, as it seems to us clear that no appeal lies, but some discussion is necessary in order to make clear an error into which the Lower Court has fallen, which might otherwise give rise to further trouble.

The applicants, who form a firm, were duly declared insolvents at the instance of two creditors, other creditors opposing the declaration. The Court then began administration of the estate, and presently the insolvents applied for their discharge. The Court held an enquiry into the conduct of the insolvents, and then, with advertence to section 25 of the Act, ruled that while it was not necessary to commit them to jail, they were not entitled to their discharge and so rejected the application. It then proceeded with the administration of the estate. Meantime, however, the insolvents filed the present appeal against the order of refusal to grant discharge, and it is this appeal which we think does not lie. No doubt in the Rules under section 31 Act IV of 1872, an appeal to the Chief Court is allowed; but in 62 P. R. 1886, (1) which was followed in C. R. 1967 of 1911, that rule was declared *ultra vires* of Government and it was held that no appeal lay in such cases, unless the order complained of amounts to a "decree," which the present order, as explained below certainly does not. We see no reason why we should not follow that ruling; and we do not see our way to treating the case as one of revision.

Under Act IV of 1872 the Court should not, so far as we can see, either grant discharge or refuse discharge until the estate has been fully administered, see section 29. Insolvents themselves prematurely moved the Court to discharge them, and in our opinion, though the Court was probably right in enquiring into their conduct, in order to see whether punishment under section 25 was called for or not, it should not have given any definite finding or order as to their right to discharge until the administration of the estate was complete. The order should be taken to mean that at that stage the Court saw no sufficient grounds for a discharge; and it should be fully understood that, when the administration is complete, the court will have full power to consider again whether discharge should be granted or not.

(1) 62 P. R. 1886 (*Ram Lal v. Ladha Singh*).

In these circumstances we dismiss the appeal, and direct that appellants do pay Rs. 32 costs to those respondents who have appeared.

Appeal dismissed.

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No. 86.

Before Hon. Mr. Justice Rattigan.

HANSRAJ AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

NARAIN CHAND AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1227 of 1911.

Construction of word "maveshi" (cattle) in entry in Wajib-ul-arz concerning grazing rights in shamilat land.

Held, that the Lower Courts were right in restricting the word *maveshi* (cattle), used in an entry in the *Wajib-ul-arz*, conferring grazing rights on non-occupancy tenants and other residents of the village over *shamilat* land, to cattle used for agricultural and domestic purposes and excluding sheep and goats kept for trading purposes.

Further appeal from the order of Major G. C. Beadon, I. A., Divisional Judge, Hoshiarpur, dated the 24th March 1909.

Dwarka Das and Rambhaji Datta, for appellants.

Tek Chand, for respondents.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—

30th October 1911.

* * * * *

The Munsiff and the Divisional Judge are agreed that the said area is sufficient to enable the non-occupancy tenants and other residents of the village, who possess the right of grazing, to graze their "cattle" and that the plaintiffs are not entitled to claim grazing rights for sheep and goats kept for trading purposes. The claim for an injunction has therefore been dismissed, and plaintiffs apply for revision of the order of the Lower Courts.

* * * * *

(c) The term *maveshi* used in the *Wajib-ul-arz* is of somewhat wide meaning, but having regard to the fact that the right of grazing which proprietors in villages concede to non-proprietors infringes largely upon the rights of the former, I think the Courts below have acted not unreasonably in restricting the right in respect of "cattle" used for agricultural and domestic purposes. I cannot believe that it was ever intended in such cases that a non-proprietor should have the right to graze any

animal he might happen to possess upon the *shamilat* land. I know of no case in which it has been held that this right is claimable in respect of animals, other than those used for agricultural or domestic purposes, and in the present case the Courts find that the sheep and goats, for which the right is claimed, are kept mainly for trading purposes. I might note that in Civil Appeal No. 1256 of 1908, this Court expressly restricted the right of grazing to "cattle required for agricultural and domestic purposes."

* * * * *

For the reasons given I reject this petition which was admitted as a further appeal under clause (b) of section 70 (1) of the Punjab Courts Act, with costs.

Appeal dismissed.

No. 87.

Before Hon. Mr. Justice Robertson.

PATHANA—(DEFENDANT)—APPELLANT,

— Versus —

NABA—(PLAINTIFF) AND WALLIA—(DEFENDANT)—
RESPONDENTS.

Civil Appeal No. 1196 of 1910.

Pre-emption—right to, of lineal descendant who is also a co-sharer—pre-emptor and vendee, having equal rights, share bargain—Punjab Pre-emption Act, II of 1905, sections 12 and 14.

Held that the fact that a pre-emptor is both a lineal descendant and a co-sharer does not give him superior rights to another lineal descendant of equal degree who is not a co-sharer; *vide* section 12, Punjab Pre-emption Act.

Held also, that where the pre-emptor and the vendee have equal rights of pre-emption, the pre-emptor is entitled to one-half of the property sold and the vendee to the other half—*vide* section 14 *ibid*.

Further appeal from the order of Rai Sahib Bhugat Nurain Das, Divisional Judge, Shahpur Division, at Sargodha, dated 13th August 1910.

Nanak Chand, for appellant.

Respondents in person.

The judgment of the learned Judge was as follows :—

10th Nov. 1911.

ROBERTSON, J.—The Lower Courts appear to have both overlooked the provisions of sections 12 (a) and 14 (b) of the present Pre-emption Act. Under that Act relationship gives the first right and when persons are equally related to the vendor, sharing in the holding gives no superior right to either.*

Consequently the pre-emptor and the vendee in this case had equal rights of pre-emption. That being the case, under section 14, clause (b), the pre-emptor is entitled to pre-empt one-half, and the vendee is entitled to retain one-half, as pre-emptor and vendee are found by the Lower Courts to be equally related to the vendor.

As to price the learned Divisional Judge seems to have again overlooked the provisions of the present Pre-emption Act. Section 22 provides that whenever the price has been fixed in bad faith the *market value* must be fixed and taken as the price to be paid.

The price has been found to be Rs. 400.

I accordingly accept the appeal and decree that the plaintiff shall be entitled to one-half of the land claimed on payment of Rs. 200 within one month of date. If not so paid the suit stands dismissed with costs. If so paid each party to bear his own costs throughout.

Appeal accepted.

No. 88.

Before Hon. Mr. Justice Shah Din.

KHUDA BAKHSH—(PLAINTIFF)—APPELLANT,

Versus

WAHAM ALI AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1248 of 1910.

Custom—alienation—power of—among Awans, Talagang Tahsil, Attock District—in presence of a son.

Held, that plaintiff had failed to prove that by custom among Awans of the Talagang Tahsil, Attock District, his father was incompetent to make an alienation of his ancestral property in his (plaintiff's) presence.

79 P. R. 1896 (1), 53 P. R. 1899 (2), 46 P. R. 1900 (3) and 8 P. R. 1906 (4), referred to.

Further appeal from the order of E. A. Estcourt, Esquire, I. C. S., Divisional Judge, Attock Division, at Campbellpore, dated the 8th April 1910.

Fazal Ilahi, for appellant.

Pestonji Dadabhai, for respondents.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—As regards the question of custom involved in this case, the decisions of this Court reported as No. 79 P. R. 1896 (1); No. 53 P. R. 1899 (2); No. 46 P. R. 1900 (3)

1st April 1911.

(1) 79 P. R. 1896 (*Bakhsha v. Mir Baz*).

(2) 53 P. R. 1899 (*Devi Dass v. Bhakra*).

(3) 46 P. R. 1900 (*Nura v. Tora*).

(4) 8 P. R. 1906 (*Khudayar v. Fatteh*).

and No. 8 P. R. 1906 (1) fully support the view which has been taken by the learned Divisional Judge, and not a single authority has been cited to me by the Counsel for the appellant in support of his position, that among Awans of Talagang *Tahsil* of the Attock District a proprietor is incompetent to make an alienation of his ancestral property in the presence of a son. I therefore hold that the appellant, on whom the burden of proof lay, has failed to prove that his father had no power to make the sale in dispute.

Even, however, if it be granted that the power of alienation possessed by the appellant's father was restricted, I agree with the Divisional Judge in holding that as the sale in the present case took place twenty years ago in payment of antecedent debts, it was for the appellant to prove that it was made without legal necessity; and I am quite clear that he has failed to discharge this *onus*.

The appeal fails and is dismissed with costs.

No. 89.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

ISMAIL—(PLAINTIFF)—APPELLANT,

Versus

MUSSAMMAT BOJE AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 435 of 1909.

Indian Limitation Act, IX of 1908, section 18—fraudulent concealment of actual vendee—deed in favour of a benamidar—suit against actual vendee within period of limitation from date when actual vendee became known.

Plaintiff sued M. S. for pre-emption on the 2nd March 1908 (the 1st being a holiday) in respect of a sale in favour of B. L. by registered deed, dated 26th November 1906, which appeared from the mutation proceedings held on 1st March 1907 to have been *benami* for M. S., the real purchaser, whose name had been fraudulently concealed from plaintiff until then.

Held, that section 18 of the Limitation Act applied, the suit being against the person guilty of the fraud, that it was immaterial that a possibly infructuous suit against the ostensible purchaser might have been instituted before the fraud became known to the plaintiff and that consequently the suit was within limitation.

Further appeal from the order of H. Leslie Jones, Esquire, Additional Divisional Judge, Ferozepore Division, dated the 25th January 1909.

Muhammad Shafi, for appellant.

Shadi Lal, for respondents.

The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—The Lower Appellate Court has *10th April 1911.*
found that the respondent Manphul fraudulently concealed from the plaintiff-appellant the fact that the sale, ostensibly effected to Bikari Lal, was actually effected to Manphul, but has declined to hold that Section 18 of the Limitation Act saved the suit from being barred by limitation on the ground that “the literal reading of the section” is against the view that the words “against any person” should be understood to follow the words “a snit” in the beginning of the section.

I am unable to concur in this conclusion.

The suit was against Manphul and Bikari Lal.

The active concealment by Manphul of the fact that he was the actual purchaser delayed the appellant's suit against him.

Manphul pleaded that he was the actual purchaser and that Bikari was not the purchaser. Had Bikari been sued alone, Manphul would doubtless have intervened or filed a separate suit based on his own title.

Under these circumstances it is, in my opinion, idle to contend that Section 18 does not extend the period of limitation by making it run from the date of the appellant's knowledge of the fraud. The suit was against the person guilty of the fraud and it is immaterial that a possibly infructuous snit against the ostensible purchaser might have been instituted before the fraud became known to the appellant.

For these reasons I hold that the suit was within limitation.

I set aside the decree of the Lower Appellate Court and I remand the appeal under Order XLI, Rule 23 of the Code of Civil Procedure, for disposal in accordance with law.

Costs of this will be costs in the cause, Counsel's fee on the higher scale.

Appeal accepted.

No. 90.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

HAIDAR HUSSAIN AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

MUHAMMAD HUSSAIN AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 635 of 1909.

Punjab Courts Act, XVIII of 1884, Section 40—appeal to Chief Court, where Lower Appellate Court decreed Rs. 3,000 compensation.

Plaintiff claimed to be part owners of a site in which the defendants were building a mosque and sued for an injunction to stop the building—both the Lower Courts found that as the building was practically completed, plaintiff was only entitled to compensation, the first Court fixing the amount at Rs. 100 and the Divisional Judge on appeal at Rs. 3,000.

Held, that on the principle laid down in 24 P. R. 1903 F. B. (1), the decree involved a question regarding property of Rs. 3,000 in value and a further appeal to the Chief Court was therefore competent.

Further appeal from the order of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 26th February 1909.

Umar Bakhsh, for appellants

Abdul Kadir, for respondents.

The judgment of the Court was delivered by —

12th April 1911.

CHEVIS, J.—This suit arises out of the building of a mosque on a plot of land. The plaintiffs who are part-owners in the site sued for an injunction to stop the building—the first Court, finding that the building was practically completed, declined to order its demolition, and granted plaintiffs a decree for money to be paid to plaintiffs as compensation, leaving it to be decided in execution proceedings what amount should be paid. According to plaintiffs they own one-third of the site, but according to defendants, plaintiffs only owned one-eighteenth; the first Court came to no decision as to what plaintiffs' share was.

On appeal by the plaintiffs the learned Divisional Judge remanded the case; holding that the amount of plaintiffs' share and the amount of damages to be awarded to them could not be left to the execution proceedings for decision. The first Court then held that plaintiffs owned only a one-eighteenth share, that the value of the site was Rs. 66, of which plaintiff's share came to Rs. 3-10-6, and that plaintiffs should get Rs. 100 as damages. The learned Divisional Judge held that plaintiffs' share was one-third, but that whatever their share was they were entitled to heavy damages, their land having been built on without their leave, and so the Divisional Judge gave them a decree for possession of their share in the land, but at the same time ordered that this decree should not be executed if defendants paid into Court for payment to plaintiffs the sum of Rs. 3,000. No time for payment of this sum was fixed.

(1) 24 P. R. 1903 F. B. (*Ghulam Ghaus v. Nabi Bakhsh*).

The defendants appeal to this Court. For the plaintiffs an objection is taken that no further appeal lies. But having regard to the amount which defendants have been ordered to pay we consider that the decree involves a question regarding property of Rs. 3,000 in value (*v. 24 P. R. 1903* (1)). If this were a pre-emption case in which plaintiffs had been given a decree on payment of Rs. 3,000, it is clear that a further appeal would lie. The only difference between a pre-emption suit and this one is that, instead of Rs. 3,000 being fixed as the sum payable by plaintiffs as a condition of their executing their decree, Rs. 3,000 has been fixed as the sum payable by defendants as a condition of plaintiffs not executing their decree. We overrule the objection.

[The remainder of the judgment is not required for the purpose of this report.]

Appeal accepted. Decree in favour of plaintiffs for Rs. 250.

No. 91.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shah Din.

MUSSAMMAT DURGA DEVI—(PLAINTIFF)—APPELLANT,

Versus

RAMZAN AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 910 of 1909.

Custom—Pre-emption—Mohalla Acharjan—Gumti Bazar—Lahore.

Held, that it had not been proved that the custom of pre-emption prevailed in Mohalla Acharjan, which is part of the recognised sub-division of Bazar Gumti in the Lahore city.

Further appeal from the order of Major A. A. Irvine, Divisional Judge, Lahore Division, dated 29th April 1909.

Hukam Chand, for appellant.

Pestonji Dadabhai, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The sole question before us upon this appeal 2nd May 1911. is whether the plaintiff has proved that the custom of pre-emption prevails in Mohalla Acharjan, which is part of the recognised sub-division of bazar Gumti, in Lahore city. The learned Divisional Judge was of opinion that no such

(1) 24 P. R. 1903 F. B. (*Ghulam Ghaus v. Nabi Bakhsh*).

custom had been established and after hearing Mr. Hukam Chand on behalf of the appellant we saw no reason to differ from that conclusion. Plaintiff has adduced documentary evidence in support of two instances of alleged pre-emption in this sub-division but we are not impressed with either instance. In 1877 a Munsif appears to have decided in favour of one Sukh Dial, who claimed to pre-empt a house sold to one Sher Singh. This claim was decreed and the house was situate in this sub-division. *Primâ facie* this would seem to be a good instance in support of plaintiff's allegation, but on further consideration we cannot attach much value to it as a precedent. From the materials before us, it would appear that the case was decided very summarily and that no attempt was made to enquire into the existence of the custom. The defendant in the case seems to have been quite content with receiving the value of the property from the plaintiff and there was no thorough investigation into the existence of the custom. The very fact that the decree of the Munsif was accepted by the vendee suggests that the latter had no wish to contest the case and allowed the plaintiff to take the house without any real fight.

The other instance, to which we have referred, is of no value whatever. Mr. Gobind Ram claimed to pre-empt a certain house and his claim was resisted by the vendee. During the course of the case the parties came to him and the plaintiff, by amicable arrangement with the vendee, was allowed to purchase the property for the latter. *Per se* this instance proves nothing, as it is quite possible that the plaintiff made it well worth the while of the vendee to settle the litigation.

These are the only so-called instances in support of which documentary evidence has been produced and in our opinion they are at best, inconclusive.

In addition to these, we have certain instances referred to very cursorily by witnesses who have deposed on plaintiff's behalf. These persons were very clear and definite, when giving evidence that on such and such occasions certain persons had preferred claims to pre-emption and that on every such occasion the claim had been recognised by the Courts and decrees passed in favour of the pre-emptors. The plaintiff was very rightly asked to substantiate this evidence by production of the records of the cases referred to, or of certified copies of the orders and judgments in these cases. He was given ample time for this purpose, but his pleader was eventually forced to admit that *owing to lack of particulars* no such documentary evidence was forthcoming. This confession is in itself a sufficient

commentary upon the value of the oral evidence. In making these remarks however we do not wish to impugn the veracity or *bona fides* of Mr. Dharm Das Suri who is known to us as a highly respected and upright pleader of this Court. He gave evidence on behalf of plaintiff, and we accept his statement that he obtained possession of half of a certain house by pre-emption. But he admits that he sued for the whole of the house that his claim was resisted by the vendee, and that it was only by a compromise that he eventually succeeded in obtaining half of the house. The witness further admits that subsequently when the vendee sold the other half of this house he preferred no claim for pre-emption, as he had no need for that half. It may be that Mr. Dharm Das is of opinion that the custom of pre-emption prevails in this quarter of Lahore city, but his opinion may well be erroneous and so far as we can gather from the materials now before us it is founded on no sound basis. Apart from the old case in 1877 plaintiff has not been able to point to a single authenticated case in which the custom has either been admitted or been proved to exist. We certainly agree with the learned pleader for appellant that cases in which vendees admit the existence of the custom of pre-emption are as valuable as cases in which the Court finds the existence of the custom established. But between such cases and these cases in which the vendee after denying the existence of the custom eventually is induced to come to terms with the pre-emptor and to compromise the dispute, there is a very substantial distinction. A litigant may be confident that he is in the right and that the other party has no just claim against him, and he may nevertheless think it prudent to accept an amicable settlement of the dispute. In the case before us there is no good proof of the existence of the custom set up by plaintiff, and we agree with the Divisional Judge that the claim must be dismissed. We accordingly reject this appeal with costs.

Appeal dismissed.

No. 92.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
Shah Din.*

JAFAR ALI SHAH AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

SANT RAM—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1315 of 1908.

Custom—alienation—Bukhari Sayyeds of mauza Fattehullah Shahwala, Tahsil Zira, District Ferozepore—governed by agricultural custom and not Muhammadan Law.

Held, that Bukhari Sayyeds of Mauza Fattehullah Shahwala, Tahsil Zira, District Ferozepore, are governed by agricultural custom in matters pertaining to their powers as land owners and not by Muhammadan Law, and that consequently their power of alienation in respect of ancestral land is not unrestricted.

Appeal from the order of Sheikh Rukn-ud-Din, Sub-Judge, 1st Class, Ferozepore, dated the 30th October 1908.

Gurcharn Singh, for appellants.

Sheo Narain, for respondent.

The judgment of the Court was delivered by—

22nd May 1911.

SHAH DIN, J.—This is a first appeal which arises out of a suit brought by the plaintiff-respondent Sant Ram, for possession as mortgagee of 4,354 *kanals* and $8\frac{1}{2}$ *marls* of land, situate in Mauza Fattehullah Shahwala, Tahsil Zira, on the strength of a registered mortgage-deed, dated the 16th November 1887, executed by one Amanat Ali Shah, by caste a Sayyed Bukhari, father of the defendants-appellants. The allegations in the plaint, on which the suit was based, briefly were that Amanat Ali Shah, father of the defendants, had executed in favour of the plaintiff a registered mortgage-deed on the 16th November 1887, by which in consideration of Rs. 5,102-8-0 he mortgaged with possession 4,601 *kanals* and $4\frac{1}{2}$ *marlas* of land; that the mortgagor had agreed to cultivate the mortgaged land under the mortgagee and to receive the produce thereof; that it was further agreed that he was to pay Rs. 250 per year as profits to the mortgagee by two half-yearly instalments; that if the mortgagor failed to pay the profits for any one harvest, he was liable to pay the same with interest at the rate of Rs. 2 *per cent. per mensem*; that if the profits and the interest due thereon were not paid for 15 years the entire amount, which would thus become due, would be treated as principal mortgage-money, and the mortgagee would be entitled to recover possession of the land. It was further alleged in the plaint that Amanat Ali Shah, mortgagor, had after execution of the mortgage-deed paid Rs. 375 to the mortgagee; that after his death his sons, the defendants, had taken possession of the mortgaged land and paid the plaintiff Rs. 190 by way of profits; that after giving credit for the amount of the profits thus realized a sum of Rs. 12,388-12-9 was still due to the plaintiff, and lastly, that, according to the terms of the mortgage-deed, the plaintiff

was entitled to recover possession of the mortgaged land, upon these allegations the plaintiff sued for recovery of possession. The defendants pleaded in substance that they had no knowledge of the mortgage-deed sued upon having been executed by their father; that the suit was barred by limitation; that they were not aware of the alleged payment of Rs. 375 having been made by their father after the date of the deed; that they themselves had never paid anything to the plaintiff; and that the mortgage in question was without consideration and legal necessity. In reply to the defendants' written statement, the plaintiff's pleader alleged that the land in suit was not ancestral and that the defendants were not agriculturists, and he therefore urged that they could not contest the alienation on the ground of want of necessity. He added that the defendants had acquiesced in the mortgage. Upon the pleadings of the parties the Lower Court drew 8 issues, of which only three, namely the fourth, the fifth and the sixth issues need only be noticed at this stage, as arguments on both sides have been limited to the points covered by those issues. They are as follows :—

4th.—Can the defendants contest the alienation on the ground of want of necessity ?

5th.—If so, was the alienation for necessity ?

6th.—Was the alienation for full consideration ?

Upon these issues the Lower Court held—

- (1) that the defendants' father, who was a *Bukhari* Sayyed, was governed in matters of alienation by Muhammadan Law and not by the custom of agriculturists; that therefore his power of alienation was unrestricted; and that consequently the defendants had no right to contest the validity of the mortgage in suit;
- (2) that apparently legal necessity for the mortgage did exist, though in view of the finding on the 4th issue a discussion of the 5th issue was unnecessary;
- (3) that full consideration was proved to have passed under the deed of mortgage sued upon. As a result of these findings, the Lower Court decreed the plaintiff's claim for possession of the mortgaged property.

The defendants have appealed to this Court, and we have heard the case very fully argued on both sides. The questions which we have to decide are :—

- (1). Whether the mortgagor, Amanat Ali Shah followed Muhammadan Law or agricultural custom, and if he followed custom, whether his power of alienation in respect of ancestral property (the land in suit being admittedly ancestral) was unrestricted;
- (2). Whether consideration for the mortgage in dispute was paid in full;
- (3). If so, whether there was legal necessity for the mortgage.

Upon the first question we hold, after giving every weight to what has been urged by the respondent's pleader, that Amanat Ali Shah, father of the appellants, was governed, not by Muhammadan Law, but by ordinary agricultural custom, and that his power of alienation with regard to ancestral property was not unrestricted. It has been contended for the respondent] that Amanat Ali Shah was a *Bukhari* Sayyed, and was as such governed *primâ facie* by Muhammadan Law; that his grandfather, Fatehullah Shah, after whose name the village, in which the mortgaged land is situated, is called, obtained a grant of the village area by way of *jagîr* from Sardar Hari Singh, a Sikh dignitary, in *Sambat* 1845; that the history of the foundation of the village shews that this grant was made to Fatehullah Shah as a holy personage, being in the nature of an *Aima* grant, as is evidenced by the fact that Fatehullah Shah founded a habitation named *Aima* Fatehullah Shah, which subsequently came to be known as *Ohak*, and which was and has always been treated as a separate habitation from *Mauze* Fatehullah Shahwala; that none of the members of Amanat Ali Shah's family are shewn to have cultivated the land with their own hands; that the connection of this family with agricultural land was not very ancient; and that Amanat Ali Shah was a literate person, apparently well versed in Persian, and belonged to the community of Sayyeds who *primâ facie* cannot be classed as agriculturists, and that therefore his family stood on a separate footing from the illiterate agricultural tribes that inhabited the neighbouring villages. We confess that we are not very much impressed by this argument. The extract from the pedigree-table of *Mauza* Fatehullah Shahwala, which is printed at page 30 of the paper-book, shews that the defendants' family settled in this village about 120 years ago, and it seems

clear that for four generations agriculture has been the occupation of its members. The plaintiff, examined as a witness in the case, admitted (page 46 of the record) that Amanat Ali Shah maintained himself upon the income of the land; and though it was hinted in his evidence and in that of a witness of his, named Raghunath Das, that Amanat Ali Shah was at one time in service somewhere in Hindustan, it has not been proved that he ever carried on any other profession except that of an agriculturist. He speaks of himself as an "agriculturist" when signing the mortgage-deed of 5th November 1881, which is relied on by the plaintiff (see page 10 of the record); and his occupation is put down as "agriculture" also in the Sub-Registrar's endorsement on the back of the mortgage-deed of 16th November 1887 (page 4 of the record). We further find that in a judgment between the present parties, dated the 6th May 1901 (exhibit page 2), it was held that Amanat Ali Shah's family belonged to an agricultural tribe and was as such governed by custom and not by Muhammadan Law. In the said judgment reference is made to another judgment, dated the 19th August 1898, in the case of *Kanshi Ram v. Jafar Ali and others* (present defendants), in the course of which the Munsif refers to the fact that the *Riwaj-i-am* of the *Zira tahsil*, in which *Mauza Fattehullah Shahwala* is situated, bore the signature of Amanat Ali Shah, thus shewing that he (Amanat Ali Shah) signed the record of tribal custom prepared for the locality as one who was governed by custom and not by personal law. It further appears that, although Amanat Ali Shah has left daughters as well as sons (the present defendants), the latter only have succeeded to his landed property to the exclusion of the former, a fact which clearly proves that this family is not governed by Muhammadan Law. Amanat Ali Shah also left a widow, Mussammat Umrai Begum, who, as appears from certain bonds on the record, acted as the *de facto* guardian of her minor sons; and this lady is not shewn to have succeeded to any part of her husband's property as a sharer according to her personal law. No doubt Amanat Ali Shah and his sons are not shewn to have cultivated their land with their own hands; but as they belong to a respectable Sayad family the mere fact that the cultivation has been carried on by them through servants or tenants by no means proves that they belong to a non-agricultural tribe. Everything on the record points to the family being regarded, by themselves and by others, as an agricultural family, and not one single circumstance has been brought to our notice which would prove that Amanat Ali Shah was governed by Muhammadan Law in any matters pertaining to his powers

as a land owner. We hold therefore that he was governed by custom and not by his personal law ; and it follows that his power of alienation in respect of the land in dispute was not unrestricted. The defendants have therefore the right to challenge the validity of the mortgage in suit.

[The remainder of the judgment is not required for the purpose of this report.]

Appeal accepted—suit dismissed.

No. 93.

Before Hon. Mr. Justice Rattigan.

GHASITA—(DEFENDANT)—PETITIONER,

Versus

SULTAN—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 1353 of 1911.

Provincial Small Cause Courts Act, IX of 1887, section 25—wrong decision on point of limitation, when not interfered with on revision.

Held, that the Chief Court will not in the exercise of its discretionary powers of revision under section 25 of the Provincial Small Cause Courts Act interfere with an erroneous decision on a point of limitation, where the judgment of the Lower Court does substantial justice between the parties.

66 P. R. 1904 ⁽¹⁾ and 19 P. R. 1901 ⁽²⁾, referred to.

Petition under section 25 of Act IX of 1887, for revision of the order of Khan Sahib Sheikh Amir Ali, Judge, Small Cause Court, Lahore, dated the 25th May 1911.

Jowala Pershad and Taj-ud-din, for petitioner.

Nabi Bakhsh, for respondent.

The judgment of the learned Judge was as follows :—

22nd July 1911.

RATTIGAN, J.—In 1896 one Gabna obtained a decree for Rs. 119-12-0, with costs against Ghasita, as principal, and the estate of Ismail deceased as surety. In execution of decree Gabna attached certain property belonging (as eventually found) to the said estate. Ismail's son, the present plaintiff Sultan, and widow objected to the attachments and as a result the question had to be fought out in a regular suit in which the ultimate decree was in favour of Gabna. Thereafter, in December 1906, Sultan paid Gabna the decretal amount (*viz.*, Rs. 119-12-0 *plus* Rs. 10 costs) and on the 2nd August 1910 he brought the present claim against Ghasita for the said amount and also for (1) Rs. 40 expended in the previous

⁽¹⁾ 66 P. R. 1904 (*Sayad Mir Shah v. Atar Singh*).

⁽²⁾ 19 P. R. 1901 (*Faqir Chand v. Mussammat Bal Kaur*).

litigation with Gabna, the decree-holder; and (2) interest on the amount due.

Defendant Ghasita, pleaded, *inter alia*, that the claim was barred under article 81 of the Limitation Act, having been brought more than three years after the date of payment in December 1906.

The Judge of the Small Cause Court apparently accepted the evidence of certain witnesses and the statement made in the plaint to the effect that in January 1907 the defendant had promised to pay the money to plaintiff in 6 months time *i. e.*, by the end of July 1907. The learned Judge appears to have thought that this acknowledgment of the debt extended the period of limitation and brought the suit within time. Obviously this was an error. In the first place section 19 of the Limitation Act could have no application, as there was no acknowledgment in writing signed by the defendant, and in the next place, even if plaintiff had three years from the 31st July 1907 within which to sue, the present suit, which was instituted on the 2nd August 1910, would be barred by time.

The learned Judge, however, held the suit to be within time and finding in favour of plaintiff on the merits, gave him a decree for Rs. 306 which included the said decretal amount and the costs of the former litigation and interest at the rate of As. 8 *per cent. per mensem*.

Defendant Ghasita has applied under section 25 of Act IX of 1887, to this Court for revision of the decree of the Small Cause Court, and I am bound to say that, that Court erred in law in holding the claim to be within time. On the other hand, there can be no gainsaying the contention that the claim was just and that defendant's refusal to repay plaintiff the money, which the latter had to pay, on defendant's behalf to Gabna is very discreditable. In the circumstances ought I to interfere? In this connection Mr. Nabi Bakhsh has referred me to certain passages in Mr. Justice Chatterji's judgment in No. 66 *P. R.* 1904 (1). In the course of that judgment the learned Judge observed: "In an appeal it is the right of the appellant to obtain an adjudication, and one in his favour if his grounds are made out irrespective of the question whether substantial justice is or is not thereby dispensed in the case. A point of law or procedure may in a particular case work great hardship, but in an appeal the Court is bound to give effect to it without regard to the consequence. In cases of revision

(1) 68 *P. R.* 1904 (*Sayad Mir Shah v. Attar Singh*).

“ it is quite otherwise. No party has the right to obtain an adjudication, and it is entirely within the discretion of the Court to interfere or not, as it thinks fit. It will not interfere to perpetuate an injustice, but only to promote the ends of justice. Suppose a just claim is really barred by time but is erroneously held not to be so by the Lower Court, or a forfeiture clause under a contract, which would work great hardship in a particular instance, is erroneously held not to apply—in such a case a Court of appeal would be obliged to enforce the law, but a Court of revision would ordinarily refuse to act.” See also No. 19 P. R. 1901 (1). The very instance given by the learned Judge as an illustration is now before me, and agreeing as I do with the principle enunciated in the passage cited, I have no hesitation in declining to interfere on revision with a decree, which though based on an error of law, does substantial justice between the parties. Furthermore, I see no good ground for refusing to allow the plaintiff to claim the costs which he incurred in the previous litigation or the interest allowed him by the Lower Court.

I accordingly reject this petition with costs.

Revision rejected.

No. 94.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

DUNGAR AND OTHERS—(PLAINTIFFS)—PETITIONERS,

Versus

NANHA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Revision No. 600 of 1911.

Provincial Small Cause Courts Act, IX of 1887, section 32 (2)—imperative—date of institution not affected by remand for retrial.

Held, that the terms of section 32 (2), Provincial Small Cause Courts Act are imperative and apply to a suit instituted before the Court was invested with Small Cause Court jurisdiction, and that the date of institution is not affected by a remand order directing retrial *de novo* after the Court had been invested with such jurisdiction.

Petition under section 70 (a) of Act XVIII of 1884, for revision of the order of Bhai Umrao Singh, District Judge, Rohtak, dated the 6th February 1911.

Raushan Lal, for petitioners.

Sukh Dial, for respondents.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—This application and Civil Revision 8th July 1911. 601, 602, 603, 604, 605, 606 and 197 of 1911, can be disposed of together, the same point being involved in each.

The suit was instituted in the Court of a Munsif without Small Cause Court powers. It was dismissed in default on the 20th December 1909 under order IX, rule 3 of the Code of Civil Procedure.

It was restored to the list of pending cases on the 25th January 1910 by a Munsif with Small Cause Court powers. He was transferred during the hearing and was succeeded by a Munsif with Small Cause Court powers who decreed the suit.

On appeal the District Judge remanded the suit for trial *de novo* to the Court of a Munsif, who had Small Cause Court powers and tried the suit under Small Cause Court procedure.

The question for consideration is whether the suit could be so tried.

The District Judge held that no appeal lay to his Court the suit having been tried, though erroneously, as a Small Cause Court case.

Section 32 (2) of the Small Cause Courts Act provides that nothing in the previous sub-section applies to suits instituted or proceedings commenced in Small Cause Courts before the date on which they were invested with that jurisdiction.

The suit was instituted before the Court of the Munsif was invested with Small Cause Court jurisdiction and the fact that the remand order directed retrial *de novo* does not affect the date of institution.

Kauleshar Rai v. Dost Muhammad Khan (1) and *Mangal Sen v. Rup Chand* (2) cited for the respondents are not applicable to the facts of this case.

The terms of section 32 (2) of the Small Cause Courts Act are imperative and I have no alternative to setting aside the decree of the Small Cause Court under section 25 of the Act and ordering retrial as an ordinary suit by the Munsif. I order accordingly costs of this Court will be costs in the cause.

Revision accepted.

(1) (1883) I. L. R. 5 All. 274.

(2) (1891) I. L. R. 13 All. 324.

No. 95.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

THAKAR DAS AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

PERMA NAND AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 641 of 1911.

Civil Procedure Code, 1908, order XLIII, rule 1 (k)—appeal from order of abatement.

Held, that no appeal lies under order XLIII, rule 1 (k), where there has been no application to the Court to set aside an abatement.

Further appeal from the order of Q. L. Dundas, Esquire, Divisional Judge, Rawalpindi Division, dated the 22nd February 1911.

Kishori Lall, for appellants.

Pestonji Dadabhai, for respondents.

The judgment of the learned Chief Judge was as follows:—

6th July 1911.

SIR ARTHUR REID, C. J.—A preliminary objection that no appeal lies, has force.

The appeal purports to be under order XLIII, rule 1 (k), which provides an appeal from an order under rule 9 of order XXII, refusing to set aside the abatement or dismissal of a suit. Here there was no application to the Court to set aside the abatement, and an appeal consequently does not lie. The value of the suit is Rs. 250 and the suit is unclassified. A further appeal therefore does not lie.

The appellants' remedy was by application to the Court to set aside the abatement. His failure to avail himself of this remedy precludes interference under section 70(1) (a), for which his pleader prays.

The appeal fails and is dismissed with costs.

Appeal dismissed.

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No. 96.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shah Din.

GURDAS AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

BHAG AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 407 of 1910.

Preliminary Decree—Civil Procedure Code, Act V of 1908, section 2 (2)—order returning plaint for amendment—appeal—revision—declaratory decree

in respect of right to realise *birt*—*parohit* and *jujmans*—*Specific Relief Act, I of 1877, sections 40 and 54.*

Where the first Court passed the following order—"plaintiffs cannot " bring a suit for declaration of *birt* and should bring a suit for injunction " and added—" order announced to Counsel of parties and plaintiff's counsel are " directed to comply with the order till 14th August 1909, for which date " the case is postponed."

Held, that this was merely an order returning the plaint for amendment within a specified period and not a preliminary decree within the meaning of section 2 (2), Civil Procedure Code, and that consequently no appeal was competent under the provisions of the Code.

Held also, that although the order was only interlocutory, the very peculiar circumstances of the case justified the Chief Court in dealing with it on the revision side.

Held also, that plaintiff's claim to a decree declaratory of their so-called right as heirs of one Buta to realize *birt* could not be recognized by a Civil Court, the so-called right not being *property* within the meaning and for the purpose of section 42 of the Specific Relief Act, 1877.

[The relations between a *parohit* and his *jujmans* discussed.]

8 P. R. 1901 (1), differed from, and

7 P. R. 1877 (2), *Strimathoo Moethoo v. Dorasingu Tevar* (3), *Sainarendra Chandra Deb v. Birendra K. Deb* (4) and 115 P. R. 1883 (5), referred to.

Held further, that the objections to the grant of a declaratory decree are equally fatal to the grant of an injunction, in the absence of a specific agreement between the parties (*vide* section 54 Specific Relief Act).

Rajavalad Shivapa v. Krishnalhab (6) and *Daya Ram Hargovan v. Jetha Bhat Lakhmiram* (7), referred to.

Further appeal from the order of A. H. Parker, Esquire, Additional Divisional Judge, Lahore Division, dated the 22nd day of February 1910.

Dhanpat Rai and Jowala Pershad, for appellants.

Moti Lal, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—Plaintiffs and defendants are *Acharaj Brahmins* of Lahore, and the former have instituted a suit in which they claim, both under Hindu Law and under the provisions of a will, to be the heirs of one Buta Mal deceased. They assert that defendants have taken possession of a

1st June 1911.

(1) 8 P. R. 1901 (*Gur Sahai v. Karam Chand*).

(2) 7 P. R. 1877 F. B. (*Gobind v. Sadda*).

(3) (1875) 15 B. L. R. 108 P. C.

(4) (1908) I. L. R. 35 Cal. 789—794.

(5) 115 P. R. 1883 F. B. (*Ramdial v. Budha*).

(6) (1879) I. L. R. 3 Bom. 232.

(7) (1896) I. L. R. 20 Bom. 784.

house belonging to the estate of the said deceased and deny their rights as the lawful heirs of the latter. Plaintiffs therefore claim (1) possession of the said house, and (2) a declaration that they, as the heirs of the deceased, are entitled to the moveable property appertaining to his estate, including the right to realize *birt* offering from the deceased's *jujmans*, defendants pleaded that the relief prayed for, as regards the right to realize *birt* offerings, was not maintainable inasmuch as the declaration sought related to the right to collect offerings in the future, and that such a right was not property within the meaning of section 42 of the Specific Relief Act.

The Sub-Judge, relying upon the ruling of this Court in No. 115 P. R. 1883 (1), held that plaintiffs could not ask for a declaration in regard to rights which might arise hereafter but did not exist at the moment. He therefore held that "plaintiffs were not competent to bring a suit for declaration of *birt* and should bring a suit for injunction." To this order he, on the same date appended the following note:—"Order announced to the counsel of parties and plaintiffs' counsel are directed to comply with the above order till 14th August 1909, for which date the case is postponed."

Plaintiffs did not comply with the said order, but before expiry of the specified period lodged an appeal in the Court of the Divisional Judge, at the hearing defendants objected that the order of the Sub-Judge was one returning the plaint for amendment and that no appeal could lie therefrom, but this objection was overruled by the learned Divisional Judge on the ground that the order in question was equivalent to a dismissal of plaintiffs' suit for a declaration as to *birt* and as such a preliminary decree from which an appeal was competent. He, therefore, entertained the appeal and upon the merits agreed with the views of the Sub-Judge that the claim for declaration as to *birt* did not lie.

The appeal having been dismissed by the Divisional Judge, plaintiffs have preferred a further appeal to this Court and the first question before us is whether the order of the Sub-Judge was a "decree," whether preliminary or otherwise, from which an appeal would lie.

It is not easy to define exactly what is intended by the expression "preliminary decree" in section 2 (2) of the Civil Procedure Code, and we have no desire to enunciate any general proposition in this case, as we are clearly of opinion

(1) 115 P. R. 1883 F. B. (*Ramdial v. Budha*).

upon the facts before us that the order of the Sub-Judge was not intended to be a "decree" in any sense of the term. It is admitted that no formal decree was drawn up, and *per se* this would seem to be fatal to the contention that the order, though not embodied in the form of a decree, was in reality such and therefore appealable (see *Bai Diwali v. Vishnov Manor Das*).

But apart from this objection, it is, we think, clear from the note which the Sub-Judge appended to his order (and this note was meant to be read as part of that order) that the Judge's intention was merely to return the plaint for amendment within a specified period. It is impossible for us to say what action the Sub-Judge might have taken if plaintiffs had simply refused to comply with his order and the case had come before him again for final orders on the 14th August 1909. It is possible that he might have rejected the plaint (order VII, rule 11 (d) of the Civil Procedure Code), but it is equally possible that he might then have struck out this particular relief from the plaint, or have passed some other order. It is futile to surmise upon these points or to hazard a guess whether any such order would or would not have amounted to "a preliminary decree" or to a final decree within the meaning of Section 2 (2) of the Code. The broad fact remains that the only order, which he actually passed, was one returning the plaint for amendment and from such an order (which does not amount to a preliminary decree) no appeal is competent under the provisions of the Code. We must, therefore, hold that no appeal lay in this case to the Divisional Judge and *a fortiori* that no further appeal lies to this Court.

Mr. Dhanpat Rai asks us, however, to treat this memorandum of appeal as a petition for revision of the order of the Sub-Judge, and in support of his prayer, contends that that order was in effect a refusal on the part of the Sub-Judge to exercise a jurisdiction vested in him by law. Mr. Moti Lal, on the other hand, argues that the said order, not being final but merely interlocutory, is not open to revision and that the proper course for plaintiffs to adopt is to await final orders and then to take such steps as they may deem fit. There is force in this contention, but, reluctant as we are to depart from the ordinary and very wholesome rule of practice that obtains in this Court, we think that we are justified by the very peculiar facts of the case, in making an exception on this occasion.

The question at issue is one of law only, and the Sub-Judge, though technically he has not yet passed final orders

has in point of fact given his decision upon it. In the interests of all parties, therefore, and to avoid further delay and unnecessary expense, we have decided to hear arguments upon the question and to determine it finally between the parties. We proceed, therefore, to hear the learned pleaders on behalf of their respective clients.

The judgment of the Court was subsequently delivered by—

8th June 1911.

RATTIGAN, J.—After hearing Mr. Dhanpat Rai for the plaintiffs and Mr. Moti Lal for the defendants, and after careful consideration of the authorities bearing upon the subject, I am of opinion that the Sub-Judge was right in holding that plaintiffs' claim to a decree declaratory of their so-called right, as the heirs of Buta Mal, to realize *birt* cannot be recognized by a Court of law.

Section 42 of the Specific Relief Act, 1877 enacts that "any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled," &c.

Now, it is not contended in the present case that defendants deny plaintiffs' *status* as *Acharaj* Brahmins. Defendants have never challenged plaintiffs' *status* as such. But they do deny the right of plaintiffs to come forward as the heirs of Buta Mal and to claim, as such heirs, the property left by the latter and to this extent plaintiffs' claim to a declaratory right is unquestionably maintainable. But the question before us is whether such part of the claim as relates to the alleged right to *birt* can receive judicial recognition, and for this purpose we have to consider whether that so-called right is "property" within the meaning and for the purposes of the said section. And in this connection, I might observe that from a legal point of view the question would have been to all intents and purposes the same if the late Buta Mal had himself, in his life time, sought a declaration against defendants to the effect that he alone was entitled to receive *birt* (or priestly dues) from his *jujmans*. In that event, as in the case before us, the question would have been whether the right set up could be regarded as "property." It is admitted that a particular *parohit* (or priest) cannot compel his so-called *jujmans* to engage him on the occasions when the latter have need of a priest's services; that the *jujmans* are at liberty to employ any *parohit* whom they prefer, and to pay fees to the particular person employed

by them. It very frequently happens that *jujmans* with oriental conservatism prefer to keep to a particular family of *parohits*, but they are under no obligation, religious or secular to do so, and it is open to them to select a total stranger if they think proper. In the circumstances it is, I think, a strange misconception of legal terminology and legal principles to speak of the "right" of a *parohit* to perform such ceremonies or to receive such dues as consideration therefor. No *parohit* can assert that he has any such right inherent in himself, and the utmost that he can say is that he hopes and expects that *jujmans* who have heretofore employed him and his predecessors will continue to call him in when a priest's services are required. In my opinion this is a mere *spes* or expectation and cannot be regarded as a legal right or as legal property.

In No. 8 P. R. 1901 (1) the late Chief Judge, in a Single Bench ruling, observed that "it may be taken as settled law" that *birt* is an assignable and inheritable property and it may "be the subject of contract, ancestral right or customary proceeding.....this as between the participators in the "right of taking *birt*." In support of this remark the learned Chief Judge referred to No. 7 P. R. 1877 (2). I have carefully studied the judgments of the learned Judges in that case and I can find therein no support to the very broad proposition enunciated by Sir William Clark, Plowden, J. it is true in a judgment which is somewhat peculiar for its note of diffidence and hesitancy, held admittedly in opposition to the then weight of authority, that the priestly office and its incidents might well be regarded in the light of property as a subject of inheritance and subject to certain restrictions, assignable. But Fitzpatrick, J. was very decidedly of a contrary opinion. "As long" he remarked "as the exclusive right "of a *parohit* to minister to and receive fees from his *jujmans* "was recognized by the Courts, such a claim would be "intelligible enough. The right of the *parohit* was thus "somewhat analogous to a right to officiate in a shrine and "receive the offerings made there or again to a right to take "tolls in a market. It was a species of property which might "descend to heirs and of which one heir might claim a share "as against the others. But when once it was laid down that "*jujmans* might employ and pay fees to any *parohit* they pleased, "this species of property was in a legal point of view annihili-

(1) 8 P. R. 1901 (*Gur Sahai v. Karam Chand*).

(2) 7 P. R. 1877 F. B. (*Gobind v. Sadda*).

“lated and no question as to their right to succeed to it
 “could any longer arise. No doubt the position of hereditary
 “*parohit* as carrying with it the good will of an established
 “professional connection is still valuable, and accordingly it
 “is not uncommon for the heirs of a deceased *parohit* to enter
 “into agreements among themselves as to the seasons in which
 “they will officiate and as to the manner in which they will
 “share their fees. When such agreements have been entered
 “into they will of course be enforced like any other contracts
 “(No. 62 P. R. 1867) (1)..... But when the claim is
 “based merely on plaintiff's right as heir to a share of the
 “office as to a share of property left by a deceased person, I
 “am of opinion that it cannot be sustained, there being in fact
 “as I have already said, nothing to inherit.” Owing to this
 difference of opinion the question was referred in a concrete
 form to the Full Bench and the decision of the latter was as
 follows :—

“The only question referred to us in the order of the 10th
 “August is whether A as being the right heir of G, can main-
 “tain a suit against B for the money received by him from
 “certain *jujmans* who erroneously thinking that B was the
 “heir of G and that A had no pretensions to be such heir erro-
 “neously paid their fees to B during the month fixed. We
 “think this must be answered in the affirmative.”

It is obvious from these extracts that the Full Bench did not
 decide the question now before us, and that upon that ques-
 tion in its abstract form, the opinions of Plowden, J. and Fitz-
 patrick, J. were diametrically opposed to each other. I cannot
 therefore agree with the late Chief Judge that “it may be
 “taken as settled law that *birt* is an assignable and inheritable
 “property,” and I observe that the learned Judge him-
 self admits that “as between the *Acharja* and the *jujmans* there
 “is no property; the relation is purely voluntary and the
 “*jujmans* can employ whatever *Acharj* they choose.” And in
 a latter passage the learned Judge further concedes, “the pro-
 “perty in *birt* is of an uncertain and indefinite character; it
 “depends on the good will of the *jujmans* and if the *jujmans*
 “prefers another *Acharj*, the property has ceased to exist.”
 (No. 8 P. R. 1901 (2) p. 33.) With every deference, I cannot
 agree that an uncertain, indefinite privilege of this kind can
 be described as property. In my opinion the so-called right

(1) 62 P. R. 1867 (*Ram Kishen v. Doonee Chund*).

(2) 8 P. R. 1901 (*Gur Sahai v. Karam Chand*).

on the part of a *parohit* to *birt* is in law, no right at all and does not amount to "property" for the purposes of Section 42 of the Specific Relief Act. It is at most a mere *spes successionis* or contingent right, which is admittedly dependent for its existence upon the pleasure of the *ujmans* and which therefore, may never have any existence. It cannot as such form the basis for a declaratory decree. As remarked by their Lordships of the Privy Council in an early case :—"It appears to have been very reasonably ruled in India that the Courts will not try questions of title as to future interests when neither claimant has a right to prevent possession, especially questions of title, which like the present, may never arise." (*Strimathoo Moothoo v. Dova Singa Javar* (1). See also *Samarindra Chandra Deb v. Birendra K. Deb* (2) Collett's Specific Relief Act, 3rd Ed. p. 303.)

In No. 115 P. R. 1883 (3) the question arose whether plaintiffs, *chumars* of a village, could claim a declaration that they were entitled to a two-third share in the skins of all animals dying in the *panna* of their village. Rattigan, J. held they could not. "It seems to me" he said "that the section contemplates a right to property which is *in esse*, though the right itself may be deferred, as that of a reversioner, and not a right to property *in posse*, or which is non-existent at the time when the right is asserted and which may or may never come into existence.....A mere possibility is not property in any true sense of the expression.....Now in the present case the plaintiffs as village *chumars* have no right of property in the skins unless and until the animals die in the village. The right, therefore, is a mere possibility, which in several contingencies might never accrue, as for instance the animals now in existence being sold out of the village or by their dying elsewhere. It could never have been intended by the legislature in enacting Section 42 of the Specific Relief Act that the Courts should be occupied in determining purely speculative rights which might never come into existence. If the plaintiffs desire to have their rights in the skins of animals dying in the village determined, they should wait until an animal dies and then bring a test suit."

We have not here to deal with the right of plaintiffs to claim a refund of fees actually paid to defendants, and it is unnecessary, therefore, to discuss the question whether such a

(1) (1875) 15 B. L. R. 83 (p. 108) (P. C.)

(2) (1908) I. L. R. 35 Cal. 777 F. B. (pp. 789--794).

(3) 115 P. R. 1883 F. B. (*Ramdial v. Budha*).

claim would or would not be maintainable, either upon the basis of agreement between the parties or in virtue of a customary right recognizing plaintiffs' rights in respect of such fees when actually paid. It is possible that a suit so framed would be sustainable in law, (see as to this, *Limba Bin Krishna v. Rama Bin Pimplu* (1), *Dinonath Chuckerbutty v. Pratap C. Goswami* (2), *Waman J. Joshi v. Balaji K. Patil* (3) and No. 7 P. R. 1877 (4) per Plowden, J.), but I prefer to leave the matter open until the point actually arises.

The conclusions then, at which I arrive, are that the prayer by plaintiffs for a decree declaratory of their alleged right to *birt* is not entertainable in law and that the Sub-Judge was right in directing amendment of the plaint *pro tanto*. But I cannot agree with the Sub-Judge that plaintiffs are entitled to claim an injunction against defendants in respect of their alleged right to *birt*. Apparently defendants admitted that a suit would lie for an injunction restraining them from visiting the houses of *jujmans* during specified days of the month. It certainly would, if defendants had covenanted with plaintiffs not to visit *jujmans* during those days, but in the absence of any such agreement (and I believe none such was pleaded) I consider that the objections urged to the grant of a declaratory decree are equally fatal to the grant of an injunction. Before an injunction can be granted under Section 54 of the Specific Relief Act, "the plaintiff's case must disclose a breach, whether "actual or threatened, by the defendant of some present legal "right vested in the plaintiff." (Nelson's Law of Injunction p. 366.) But plaintiffs have no legal right to *birt* vested in them and therefore they cannot claim an injunction to restrain a threatened breach of that right. The late Chief Judge, it is true, granted an injunction in the case above cited (8 P. R. 1901 (5), but with every respect, I venture to doubt whether he had jurisdiction to make the order (see as to this *Raja Valad Shirapa v. Krishnabhat* (6) and *Daya Ram Hargovan v. Jetha Bhat Iakhlmiram* (7). Moreover, this objection apart, I cannot see what particular advantage would accrue to plaintiffs from an injunction of the kind issued in No. 8 P. R. 1901 (5), evasion of which would be the easiest of tasks.

(1) (1889) I. L. R. 13 Bom. 548.

(2) (1900) I. L. R. 27 Cal. 30.

(3) (1890) I. L. R. 14 Bom. 167.

(4) 7 P. R. 1877 F. B. (*Gobind v. Sudda*).

(5) 8 P. R. 1901 (*Gur Sahai v. Karam Chand*).

(6) (1879) I. L. R. 3 Bom. 232.

(7) (1896) I. L. R. 20 Bom. 784.

For the reasons given I would reject this memorandum of appeal whether treated as such or as a petition for revision and I would direct the Sub-Judge to grant plaintiffs such further extension of time as he may consider sufficient to enable them if so advised to amend their plaint. Costs should, I think, be left to abide the event.

Appeal rejected.

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Emperor v. Kehri, (1907) *I. L. R.* 29 *All.* 434, followed.

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(4) *Confession by co-accused who has pleaded guilty, when irrelevant as against the other accused—Indian Evidence Act, section 30, and Criminal Procedure Code, section 271.—Held*, that when the Court accepts a plea of guilty by one of several accused persons, though not in express terms nor at the moment it was put in, a confession made by such person cannot be taken into consideration against the other accused persons.

Subrahmaniam Ayyar v. King-Emperor, (1902) *I. L. R.* 25 *Mad.* 61 (69) (*P. C.*), *Queen-Empress v. Pahuji*, (1895) *I. L. R.* 19 *Bom.* 195, *Queen-Empress v. Chinna Paruchi*, (1900) *I. L. R.* 23 *Mad.* 151, and 11 *P. R. (Cr.)* 1900, followed.

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... .. No. 11 P. R. (Cr.) 1911.

(12) SECTION 488.

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(13) SECTION 537.

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Criminal revision—rule as to finding of fact—charges against Government servant under section 161, Penal Code—proper sanction of Government—charge for receiving lump sums—examination of complainant—concurrent punishment in respect of similar offences tried separately—Criminal Procedure Code, Act V of 1898, sections 35, 197, 200 and 537 (a).—Accused, a zildar in the Irrigation Department, was convicted of four distinct offences under section 161, Indian Penal Code, and in respect of each offence, all being tried separately, was sentenced to 2 years' rigorous imprisonment and a fine of Rs. 1,000, with a direction that the sentences of imprisonment imposed in each case should run concurrently.

Held,

(1) that a direction that punishments inflicted in respect of distinct offences shall run concurrently, could be made only when the accused was convicted at one trial of two or more distinct offences (*vide* section 35, Criminal Procedure Code), and was consequently erroneous in this case ;

The references are to the Nos. given to the cases in the "Record."

CRIMINAL REVISION—*concll.*

(2) that although every Magistrate who takes cognizance of an offence upon complaint should ordinarily forthwith examine the complainant on oath (*vide* section 200 of the Code), a failure to comply with these provisions did not in this case occasion a miscarriage of justice or invalidate the subsequent proceedings, the complaint having been signed by a responsible public official (the Public Prosecutor) and accompanied by a formal sanction of the Local Government, the irregularity was, therefore, cured by section 537 (a) of the Code ;

(3) that the sanction of Government under section 197 of the Code for the prosecution of the accused was not bad in law merely because it sanctioned prosecution under section 161, Indian Penal Code, "or any other section of the Code that may be found to be applicable" "in respect of an offence briefly described in the Schedule hereto "annexed," and the Magistrate trying the case was at liberty to determine whether the facts alleged against the accused constituted an offence under section 161 or any other section of the Penal Code ;

(4) that where the facts alleged against the accused were that sums of money were collected by *lambardars* and others from the landholders of the various *chaks* and were paid in each case by them to the accused in a lump sum with the object of inducing him to show favour in his official capacity to those *chaks* as a whole, the charge in each case, of having received a certain lump sum from the *abadkars* of the *chak*, was legal and correct; and

(5) that in revision cases, the well established rule of practice in the Chief Court is "that the orders of Criminal Courts are not to "be interfered with upon the facts save in rare cases and for very "exceptional reasons."

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Discharge—legality of further enquiry by Magistrate whose order of discharge has not been set aside by higher authority—when further enquiry should be made—Criminal Procedure Code, Act V of 1898, section 437.—Held, that when a Magistrate has passed an order discharging an accused person it is competent to the same Magistrate or to another Magistrate of co-ordinate jurisdiction to take fresh proceedings against the accused upon the same facts, although the order of discharge has not been set aside by higher authority.

But held also that, generally speaking, further inquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete.

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E

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Excise Act, XII of 1896, section 49—sale of charas by a license-holder of "sale in bond" license to a person on the understanding that he must take out a license before delivery—not punishable.—Where a holder of a "sale in bond" charas license sold charas in bond to a person who at the time had no license of any kind for the purchase or sale of the drug, on the understanding that he could not obtain delivery and possession without taking out a license.

Held, that for the purposes of the Excise Act, the sale would not be complete until delivery of the charas to the purchaser or some one on his behalf, and that delivery was not effected, by retention in bond in the hands of the Excise authorities on behalf of a person who could not obtain delivery until he took out a license, and that there was consequently no breach of the license punishable under section 49 of the Excise Act, 1896.

... .. No. 4 P. R. (Cr.) 1911.

F

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(b) Confession made to Zaildar in presence of Police inadmissible under section 25.

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(3) SECTION 30.

Confession of one accused who has pleaded guilty—when irrelevant as against the other accused.

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... .. No. 15 P. R. (Cr.) 1911.

The references are to the Nos. given to the cases in the "Record."

INDIAN EVIDENCE ACT—*concl'd.*

(4) SECTION 30.

Held, that a retracted confession may be taken into consideration under section 30 of the Evidence Act as against the persons tried jointly with the confessing accused for the same offences, but that, as a general rule, such a confession should not be considered as supplying sufficient evidence for the conviction of the co-accused, unless it is corroborated by independent testimony in material particulars affecting such co-accused.

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(5) SECTION 32.

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... .. No. 11 P. R. (Cr.) 1911.

(2) SECTION 225 B.

Rescuing a deserter from the Army from Police custody—Criminal Procedure Code, section 54 (1) sixthly.—*Held*, that a Police officer is empowered under section 54 (1) *sixthly* to arrest without a warrant a person reasonably suspected of being a deserter from His Majesty's Army and, therefore, persons who intentionally offer any resistance or illegal obstruction to his apprehension or rescue or attempt to rescue him from such custody are guilty of an offence under section 225 B., Indian Penal Code, as amended by Act X of 1886.

... .. No. 20 P. R. (Cr.) 1911.

(3) SECTIONS 299 AND 301.

Person striking out wildly with a dangerous weapon and causing death of a person without intention to kill or knowing himself to be likely to cause death of such person, guilty of murder.

See *Murder (1)*.

... .. No. 12 P. R. (Cr.) 1911.

(4) SECTION 304.

First part—what cases it includes.—*Held*, that the first part of section 304, Indian Penal Code, is intended to include only those cases in which the acts of the accused person would be culpable homi-

The references are to the Nos. given to the cases in the "Record."

INDIAN PENAL CODE, 1860—concl'd.

cide amounting to murder, but for the fact that it was committed in circumstances which render one or other of the exceptions to section 300, Indian Penal Code, applicable.

... .. No. 3 P. R. (Cr.) 1911.

(5) SECTION 361.

Wife of one man sold to another with whom she was living—lawful custody.

See *Kidnapping*.

... .. No. 7 P. R. (Cr.) 1911.

(6) SECTIONS 417 AND 420.

Only offence of cheating punishable under section 417, meant by "cheating" as used in section 562, Criminal Procedure Code.

See *First Offender*.

... .. No. 16 P. R. (Cr.) 1911.

J

JURISDICTION (CRIMINAL).

Jurisdiction (Criminal)—Dacoits—belonging to a gang of—resident of Native State—arrested in the State—Criminal Procedure Code, Act V of 1898, section 181 (1)—Indian Penal Code, section 400.—Held, that the words "may be inquired into or tried by a Court within the "local limits of whose jurisdiction the person charged is" in section 181 (1) of the Criminal Procedure Code, justify the commitment by a Magistrate of the Gurgaon District to the Gurgaon Sessions Court, of a resident of a Native Indian State arrested in that State and accused of the offence of belonging to a gang of dacoits.

... .. No. 1 P. R. (Cr.) 1911.

K

KIDNAPPING.

Kidnapping—wife of one man sold to another with whom she was living—lawful custody—Indian Penal Code, section 361.—Held, that where A (a Hindu), husband of a girl under sixteen years of age, had sold her to another man B. with whom she was living and petitioner had persuaded her to leave the latter's house and go away with another man, the petitioner was guilty of an offence under section 361 of the Penal Code, inasmuch as B. was at the time the lawful guardian of the girl for the purposes of that section, however immoral and reprehensible the act of A was in selling her to B.

... .. No. 7 P. R. (Cr.) 1911.

The references are to the Nos. given to the cases in the "Record."

L

LAWFUL CUSTODY.

Where a minor girl, wife of a Hindu, was sold by her husband to another person with whom she was living and was persuaded to leave the latter's house, the latter was her lawful guardian for purposes of section 361, Penal Code.

See *Kidnapping*.

... .. No. 7 P. R. (Cr.) 1911.

LICENSE.

Sale of *charas* by a license-holder of "sale in bond" license to a person on the understanding that he must take out a license before delivery, is no breach of the license punishable under section 49 of the Excise Act.

See *Excise Act*.

... .. No. 4 P. R. (Cr.) 1911.

M

MAINTENANCE.

Order of, under section 488, Criminal Procedure Code, must be in money and not in kind.

See *Criminal Procedure Code* (13).

... .. No. 19 P. R. (Cr.) 1911.

MURDER.

(1) *Murder—person striking wildly with dangerous weapon without intention of killing anyone—Indian Penal Code, sections 299 and 301.—Held*, that an accused person who breaks into a dwelling-house at night and, in order to evade arrest, strikes out "wildly" with a dangerous weapon regardless of the effect of his blows and by so doing actually causes the death of a person, is guilty of culpable homicide as defined in section 299 (*vide* section 301) of the Indian Penal Code, notwithstanding that he never intended or knew himself to be likely to cause the death of such person.

... .. No. 12 P. R. (Cr.) 1911.

(2) *Murder—where no vital part is injured—confession to Zaildar in consequence of inducement and confession to Zaildar in presence of police—admissibility of—Indian Evidence Act, sections 24-25.—Held*, that a man who has either hacked a fellow-creature about in a most merciless fashion or has practically pounded him to death, cannot escape conviction of murder merely by urging that he was careful to avoid injuring a vital part.

Held also, that a promise held out by a Zaildar is a promise "made by a person in authority" within the meaning of section 24 of the Indian Evidence Act, and that a confession made to a Zaildar in consequence of such promise is inadmissible in evidence.

The references are to the Nos. given to the cases in the "Record."

MURDER—concl'd.

Held further, that a confession made to a Zaildar in the presence of the police and after arrival of the Thanedar, who at the time of the confession was sitting only a few yards off, was in reality a confession made to the police within the terms of section 25 of the Indian Evidence Act and consequently inadmissible in evidence.

... .. No. 14 P. R. (Cr.) 1911.

O

OPIUM ACT.

Opium Act, I of 1878, section 9 (e)—exporting opium—attempt to export—punishable or not.—*Held*, that where a parcel containing opium was tendered by the accused at a post office for despatch to Burma but, owing to information received, was opened by the Post Master and sent on eventually to Burma by the postal authorities marked "doubtful" with a view to the identification of the consignee, the parcel ceased to be in the Post office on accused's behalf before it left India and the opium was therefore not *exported* by the accused.

Held also, that accused's attempt to export the drug was not punishable, section 511 of the Penal Code not being applicable.

... .. No. 2 P. R. (Cr.) 1911.

P

PENAL CODE.

See Indian Penal Code.

PUNJAB LAWS ACT.

SECTION 47—penalty.

Held, that no rules having been framed by the Local Government under sections 47 or 50 B of the Punjab Laws Act, attaching a penalty to a breach of the provisions of section 47, the latter is not a punishable offence.

... .. No. 18 P. R. (Cr.) 1911.

PUNJAB MUNICIPAL ACT.

SECTION 143 (h) (ii).

Construction of Bye-law No. 18 of Simla Municipality under—

See Simla Municipal Bye-laws.

... .. No. 21 P. R. (Cr.) 1911.

The references are to the Nos. given to the cases in the "Record."

R

RECOGNISANCE TO KEEP PEACE.

Recognisance to keep peace—Discharge of defendants—Power of District Magistrate or Sessions Judge to order further inquiry—Accused person—Criminal Procedure Code, sections 107, 119, 437.—Held (approving of 42 P. R. 1905 (Cr.)), that a person discharged under section 109, Criminal Procedure Code, is not an accused person within the meaning of section 437 and that a District Magistrate or Sessions Judge consequently is not competent to pass an order for further inquiry into the case of such person.

24 P. R. 1903 (Cr.) and 33 P. R. 1905 (Cr.) overruled.

... .. No. 6 P. R. (Cr.) 1911 (F. B.).

S

SIMLA MUNICIPAL BYE-LAWS.

Simla Municipal Bye-law No. 18—construction of—Punjab Municipal Act, XX of 1891, section 143 (h) (ii).—Held, that the appointment of an agent by a non-resident house-owner of Simla without notifying the appointment to the Engineer Secretary of the Municipality is not a compliance with Bye-law 18 framed under section 143 (h) (ii) of the Punjab Municipal Act, 1891, and such house-owner is liable to the penalties provided by clause (4) of the said bye-law.

... .. No. 21 P. R. (Cr.) 1911.

Chief Court of the Punjab.

CRIMINAL JUDGMENTS.

No. 1.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.
Mr. Justice Rattigan.

CROWN—COMPLAINANT,

Versus

GOBINDA AND OTHERS—ACCUSED.

Criminal Revision No. 1444 of 1910.

Jurisdiction (Criminal)—Dacoits—belonging to a gang of—resident of Native State—arrested in the State—Criminal Procedure Code, Act V of 1898, section 181 (1)—Indian Penal Code, section 400.

Held, that the words “may be inquired into or tried by a Court” within the local limits of whose jurisdiction the person charged is” in section 181 (1) of the Criminal Procedure Code justify the commitment by a Magistrate of the Gurgaon District to the Gurgaon Sessions Court, of a resident of a Native Indian State arrested in that State and accused of the offence of belonging to a gang of dacoits.

Case reported by A. E. Martineau, Esquire, Sessions Judge, Delhi Division, with his No. 987 of 4th October 1910.

Government Advocate, for petitioner.

Nemo, for respondent.

The proceedings are forwarded for revision on the following grounds :—

In this case nineteen persons have been committed to the Sessions Court for trial on charges under section 400, Indian Penal Code, by Lala Achhru Ram, Magistrate of the 1st class, Gurgaon. There were at first only eighteen accused persons before the Court, and the Magistrate proceeded under section 512 of the Criminal Procedure Code against the other four accused, who were said to be absconding. The evidence against accused 1 to 18 was finished on the 22nd August, and the accuseds' statements were taken on the 22nd and 23rd. After that the Magistrate went to Hodal and to Muttra to make certain inquiries in the case, and then went to Dig in Bharatpur State.

Mangtu, accused No. 19, was arrested on the 28th August in Bharatpur State, and on the 3rd September was brought

before Lala Achhru Ram, who took the evidence of a head-constable in regard to Mangtu's arrest, and the evidence of the three approvers, and also Mangtu's statement. Those proceedings took place at Dig.

On the 5th September, when the Magistrate had returned to Gurgaon, the public prosecutor raised certain objections to the proceedings taken at Dig, said that he wished to produce evidence against Mangtu, and did not close his case, and asked that the complainants might be produced and that the evidence of the persons who named Mangtu might be taken in his presence.

The Magistrate overruled the objections, refused to take further evidence, and committed the accused to the Sessions Court.

The Magistrate's procedure appears to me to have been both irregular and illegal.

In the first place he has contravened section 208 (1) of the Criminal Procedure Code in refusing to take all the evidence which the public prosecutor wished to produce. Secondly, he had no power to hold an inquiry outside his jurisdiction. He was invested with powers as a Magistrate of the Gurgaon District, and had no power to hold an inquiry at Dig in Bharatpur State. His proceedings at Dig are, in my opinion, void.

In his order of the 5th September passed on the public prosecutor's objections, the Magistrate says that all the 170 witnesses could not be produced without unreasonable expense, delay and inconvenience, and holds that section 512 of the Criminal Procedure Code, therefore, applies.

But in the first place the witnesses do not live at a very great distance. Bharatpur State, in which most or many of the witnesses live, adjoins the Gurgaon District. In the second place it would not be necessary to produce all the witnesses again. Only those would have to be produced whose evidence affects Mangtu, and they would be few in number. Moreover it appears from the commitment order that it is on the strength of the inquiry made at Dig that the Magistrate has committed Mangtu for trial.

He says in the order "The statements of the approvers and the admission of Mangtu are sufficient to commit him to the Court of Sessions."

The only other question is, whether section 531 of the Criminal Procedure Code will validate the commitment.

think it will not, for two reasons. The first is, that the words "local area" in section 531 refer only to local areas governed by the Criminal Procedure Code, *Bichitranund v. Bhugbut Perai* ⁽¹⁾. The Code does not extend to Native States, but only to British India (section 1 (2)). Consequently section 531 does not apply and cannot give validity to the proceedings taken in Bharatpur State.

The second reason, why the commitment should not be allowed to stand is, that it is quite possible that the accused Mangtu may have been prejudiced by the inquiry being made at Bharatpur. The only corroboration of the approvers' statements as against him was his own statement in which he said he had taken part in two of the dacoities. That statement was made while he was still in police custody, and it is possible that he would not have made any admissions if he had been questioned after being brought to Gurgaon and placed in the judicial lock-up. In that case he might have been discharged unless the prosecution produced other evidence to corroborate the approvers'.

For the reasons given above I am of opinion that the commitment, so far as Mangtu is concerned, is illegal, and should be quashed under section 215 of the Criminal Procedure Code.

The commitment of accused Nos. 5, 17, and 18 also appears to me to be bad for want of jurisdiction. The Magistrate has not mentioned in the charges the places at which the accused committed the offence under section 400, Indian Penal Code, but as he has mentioned the places at which each is said to have committed dacoities, I presume that he means that the offence under section 400, Indian Penal Code, was committed at those places. Accused Nos. 5, 17, and 18 are stated in the charges to have committed dacoities at certain places in the Muttra District, but not at places in the Gurgaon District.

The accused are mostly residents of Bharatpur State, and none belong to the Gurgaon District, and the first question is whether those members of the gang who did not go to the Gurgaon District, can be said to have committed the offence under section 400, Indian Penal Code, in that district. Suppose there is a gang of twenty dacoits in Bharatpur State, and five of them go and commit a dacoity in the Gurgaon District, have the other fifteen committed an offence under section 400, Indian

(1) (1889) *I. L. R.* 16 Cal. 667.

Penal Code in the Gurgaon District? In my opinion they have not. They are members of the whole gang of twenty dacoits, but not of the gang of five which go to the Gurgaon District. That gang of five is only a section or sub-gang of the gang to which the remaining fifteen belong. Those fifteen men cannot be said to have committed the offence of being members of a gang of dacoits in the Gurgaon District, when the gang, of which they are members, has never existed in that district. For this reason accused Nos. 5, 17, and 18, who did not go to the Gurgaon District with the rest of the accused, did not commit an offence under section 400, Indian Penal Code, in that district. They were members of the whole gang and not of that section of it which committed dacoities in the Gurgaon District.

The next question is, whether jurisdiction is given by section 181 (1) of the Criminal Procedure Code which provides that the offence of having belonged to a gang of dacoits may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is. If the word "is" in this clause meant "is at the time of" "the inquiry or trial" the result would be, that the offence could be inquired into or tried at any place in British India, however remote from the place where it was committed or the place of the accused's arrest. This would be an anomaly which the legislature can hardly have intended. It appears to me either that the word "is" in the clause in question has reference to the word "charged" in section 181 (1), certainly has no reference to the charge framed by the Magistrate, for that charge does not precede, but follows, the inquiry and the place at which the inquiry is to be held could not be fixed by reference to the place at which an event will occur when the inquiry is over. I think that a person must be deemed to be "charged" within the meaning of section 181 (1) of the Code at the time when he is arrested. That section, therefore does not give jurisdiction to the Gurgaon Court except in respect of persons arrested in the Gurgaon District.

Consequently the Magistrate had no jurisdiction to commit accused Nos. 5, 17, and 18 for trial, as the offence which they are alleged to have committed was not committed in the Gurgaon District, and they were not arrested in that district.

Section 531 of the Criminal Procedure Code may perhaps apply to validate the commitment of those three persons, but it will not give me jurisdiction to try them.

The only other question is whether the commitment should be quashed only in regard to accused Nos. 5, 17, 18, and 19 or *in toto*. As regards this, it is to be observed, that although the Magistrate finds there is a *prima facie* case against the accused of being members of a gang of dacoits, he has not considered the question whether there is sufficient proof of their having been members of a gang of dacoits *in the Gurgaon District*. If my views on the point of jurisdiction are correct the prosecution must be confined to the charge of the commission of an offence under section 400, Indian Penal Code, *in the Gurgaon District*, except in the case of accused No. 2, who was arrested in the Gurgaon District, and to whom section 181 of the Criminal Procedure Code will apply.

I forward the files to the Chief Court and recommend that, for the reasons I have given, the commitment be set aside, either wholly or in part.

The order of the Chief Court was delivered by—

SIR ARTHUR REID, C. J.—The question for consideration is whether the words “may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is” in section 181 (1) of the Code of Criminal Procedure, justify the commitment by a Magistrate of the Gurgaon District to the Gurgaon Sessions Court, of a resident of a Native Indian State arrested in that State, and accused of the offence of belonging to a gang of dacoits, the prisoner’s participation in any dacoity or association with dacoits in the Gurgaon District not have been alleged?

9th Dec. 1910.

Had the charge been of an offence committed in the Gurgaon District, section 177 of the Code of Criminal Procedure would have given the Gurgaon Court jurisdiction—*Juma v. King-Emperor* (1).

In *Emperor v. Magan Lal* (2) it was held that an Indian subject of Her Majesty arrested in a Native Indian State and brought into a British district under arrest must be held to have been “found” in that district and could be tried therein for an offence committed in the State.

In Criminal Appeal 208 of 1907 a Division Bench held that a person charged with committing an offence in a Native Indian State and arrested at Singapore and brought under arrest into the Ludhiana District must be held to have been “found” in that district within the terms of section 188 of the Code of

(1) 17 P. R. 1906 Cr.

(2) (1882) 1, L. R. 6 Bom. 622.

Criminal Procedure. The two authorities above cited were referred to.

In *Muhammad Yusuf-ud-din v. Queen Empress* (1) their Lordships of the Privy Council dealt with the legality of a warrant of arrest. The case before us has proceeded beyond that stage; and is stronger than the cases dealt with in the unreported and Bombay judgments, the proposition that the word "found" means "first found" having far more force than the proposition that the word "is" means "is of his own accord." The word "is" is clear and simple, while it may be contended that a person cannot be "found" after his exact whereabouts are known; and where a word standing by itself is clearly intelligible, cogent reasons for declining to accept it without qualification must be adduced. No such reasons are disclosed by section 181 or corresponding sections.

We are satisfied that the question above stated must be answered in the affirmative, and that the Magistrate consequently had jurisdiction to commit all the accused persons to the Court of Sessions which had jurisdiction over his district. This disposes of the reference.

The record will be returned to the Sessions Court.

No. 2.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

BOSTAN—(CONVICT)—PETITIONER,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 1391 of 1910.

Opium Act, I of 1878, section 9 (e)—Exporting opium—Attempt to export—Punishable or not.

Held, that where a parcel containing opium was tendered by the accused at a post office for despatch to Burma, but, owing to information received, was opened by the Post Master and sent on eventually to Burma by the postal authorities marked "doubtful" with a view to the identification of the consignment, the parcel ceased to be in the post office on accused's behalf before it left India, and the opium was therefore not exported by the accused.

Held also, that accused's attempt to export the drug, was not punishable, section 511 of the Penal Code not being applicable.

Petition for revision under section 439 of the Criminal Procedure Code of the order of E. A. Estcourt, Esquire, Sessions Judge, Attock Division, dated the 1st September 1910.

Muhammad Shafi for petitioner.

Government Advocate for respondent.

The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C.J.—The petitioner has been convicted of possessing and of exporting opium in contravention of the Opium Act, I of 1878, and has been sentenced to rigorous imprisonment for one year and a fine of Rs. 500 under section 9 (c) for the former offence, and under section 9 (e) of the Act for the latter.

On the facts found by the Courts below it was hopeless to contend that the conviction and sentence under section 9 (c) were not justified, the opium which the petitioner attempted to export from Hasan Abdal to Burma weighing 458 *tolas* and having undoubtedly been in the possession of the petitioner.

Counsel for the petitioner contended only that the conviction under section 9 (e) was bad, the opium not having been exported by his client.

This contention has force. The opium was tendered by the petitioner at the Hasan Abdal post office for despatch.

The parcel containing it was opened by the Sub-Postmaster in the presence of the constable who had warned that official of the suspicious nature of the parcel, was sent to the Postmaster of Campbellpur and was sent by him to Burma marked “doubtful,” the Excise authorities in Burma having been communicated with, with a view to the identification of the consignee. The parcel was not claimed and was sent back to India.

On these facts I am unable to hold that the opium was exported by the petitioner. It was seized by the authorities before despatch and it ceased to be in the post-office on the petitioner's behalf before it left India. It was therefore not exported by the petitioner.

He doubtless attempted to export it, but section 511 of the Penal Code does not apply, and Counsel for the Crown is unable to cite any provision of the law which makes an attempt to export the drug punishable. I allow the application to the extent of setting aside the conviction and sentence under section 9 (e) only.

Revision allowed.

No. 3.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.
Mr. Justice Rattigan.*

MASTI AND OTHERS—(CONVICTS)—APPELLANTS,

Versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 440 of 1910.

Indian Penal Code, Act XLV of 1860, section 304, first part—What cases it includes.

Held, that the first part of section 304, Indian Penal Code, is intended to include only those cases in which the acts of the accused person would be culpable homicide amounting to murder, but for the fact that it was committed in circumstances which render one or other of the exceptions to section 300, Indian Penal Code applicable.

*Appeal from the order of E. A. Estcourt, Esquire, Sessions Judge,
Attock Division, dated the 9th June 1910.*

Chuni Lal, for appellants.

Nemo, for respondent.

The judgment of the Court was delivered by—

9th Dec. 1910.

RATTIGAN, J.—This and Criminal Appeal No. 441 of 1910, relate to the same facts and in this judgment we shall dispose of both appeals.

The appellants in Criminal Appeal 440 of 1910, (1) Masti, (2) Bakhra, son of Chuhra, and (3) Bakhra, son of Muhammad, have been convicted by the Sessions Judge, Attock Division, of an offence under sections 147 and 304 (1st part), Indian Penal Code, and have been sentenced to transportation for life. Before proceeding, we might here remark that section 147 is probably a clerical mistake for section 149. The appellants in the connected appeal have been convicted under sections 149, 325, Indian Penal Code, and have been sentenced each to two years' rigorous imprisonment (including 3 months' solitary confinement). In addition, all the appellants have also been convicted of another offence of rioting and of causing grievous hurt on the same day, and for these offences, under sections 149, 325 Indian Penal Code, have been further sentenced to two months' rigorous imprisonment each. From these sentences they have appealed to this Court and we have heard their respective counsel at some length. There can be no doubt that on the 13th July last when the girdawar kanungo (Lala Shanker Das) and the patwari (Ata Muhammad), went with the

deceased Lal to demarcate certain boundaries in Rakh Bakbra an assault was made upon Lal and his friends. The appellants (with the exception of Khudayar, Ditta, Ghanya and Dalla who plead *alibis*) admit that an affray took place on that day and that they were present at the time, and it is beyond all question that the unfortunate Lal received such severe injuries that he died four days afterwards, *i.e.*, on the 17th February 1910. Naturally the prosecution and the defence are at variance as to the details of this affray, but we have no hesitation in agreeing with the Sessions Judge and the assessors that the aggressors were the appellants and that it was they who attacked Lal and his party. It seems to us that the two witnesses for the prosecution Lala Shanker Das, the girdawar kanungo and Ata Muhammad, the patwari, are entirely independent and impartial witnesses whose evidence can be accepted as a fair and true account of what occurred. They depose that in the first instance Masti and the two Bakbras came up, accompanied by the other appellants (who, however, kept in the background) and that the three former entered the enclosure where Lal and his party were sitting and violently assaulted Lal, and that thereafter all the appellants proceeded to assault the other friends of Lal who were coming up. Briefly summarised, this is the gist of their evidence, and if that evidence is true, the legal consequences would necessarily be (1) that the appellants constituted an unlawful assembly within the meaning of section 141, Indian Penal Code, (2) that every one of them was guilty of rioting under section 146, as soon as Masti, or one of the Bakbras used violence in prosecution of the common object of the assembly, and (3) that all members of the assembly would be guilty of any offence committed in prosecution of that common object by any member of such assembly if they knew that such offence was likely to be so committed.

In the present case the common object of the appellants was to prevent by force the demarcation of the boundaries; they all went armed with *dangs* and *lathis* and every one of them must have known that it was likely that Masti and the two Bakbras, when the latter entered the enclosure, would assault Lal. In the circumstances we think the Sessions Judge was fully justified in holding that all the appellants were guilty of rioting and that the appellants in the connected appeal must be held responsible for the offence of causing grievous hurt, inasmuch as they knew that Masti and the two Bakbras had entered the enclosure, armed with *lathis* with

the intention of committing an assault on Lal. There are no doubt one or two small discrepancies in the prosecution evidence but they appear to us in nowise to militate against the general truth of the story as told by the two officials, who were present on the occasion. Nor do we see any reason to doubt the evidence that all the appellants were present at the time when these occurrences took place. The *alibis* set up by Khudayar, Ditta, Ghanya and Dalla are palpably false and have rightly been rejected by the Sessions Judge and the Assessors, and the appellants have been satisfactorily identified.

The result is that we consider the convictions of the appellants in the connected appeal under sections 149 and 325, Indian Penal Code, fully justified as regards both the assault on Lal and his party and the subsequent assault on Fattah Khan and others. We accordingly maintain their convictions and sentences in respect of both these offences.

The appellants in this appeal, *viz.*, Masti and the two Bakhras, have been convicted (1) of offences under section 304, *first part* and section 149, Indian Penal Code, and as regards these offences have been sentenced to transportation for life, and (2) offences under sections 149, 325, Indian Penal Code, for the assault upon the party composed of Fattah Khan and others, and for the latter offences they have been sentenced to two months' rigorous imprisonment each. With the latter sentences we see no reason to interfere. But we cannot understand how the learned Sessions Judge arrived at the conclusion that the offence committed by these appellants with regard to Lal fell under the provisions of the *first part* of section 304. The three appellants affected by this sentence did, no doubt, urge that they were acting in self-defence, but it is clear from his judgment that the Sessions Judge does not find that any of the exceptions specified in section 300 of the Code is applicable to their case. On the contrary, his finding is entirely against them as regards any such plea. The learned Judge is apparently of opinion that in a case of this kind, if the prisoner had no intention to cause death or to cause such bodily injury as he knew to be likely to cause death or that death would probably ensue, but yet intentionally inflicted injuries which were likely to cause death, the offence is one which falls within the purview of the *first part* of section 304 of the Code. This is an entirely erroneous view of the law. The *first part* of section 304 is intended to include only those

cases in which the act of the accused person would be culpable homicide amounting to murder, but for the fact that it was committed in circumstances which render one or other of the exceptions to section 300 applicable. It is clear that the Sessions Judge did not intend to find the appellants in this appeal guilty of murder, but upon a strictly literal interpretation of his conclusions we would perforce have to find that they were guilty of that offence. He obviously meant to convict them under the second part of section 304, but in that event, the maximum sentence should have been ten years' imprisonment.

In our opinion though the assault on Lal was most violent, it is possible that the three appellants did not intend to cause his death, or such bodily injuries as were likely to cause his death. But in assaulting him, as they did, they must have known that they were likely to cause his death and they therefore committed an offence punishable under the second part of section 304. Their act comes very near to murder, but we give them the benefit of the doubt. We accordingly alter the conviction in respect of this offence to one under section 304 (2) of the Indian Penal Code, and reduce the sentences of Masti and the two Bakhra to ten years' rigorous imprisonment (with three months' solitary confinement) in each case. In all other respects the appeals are rejected.

Sentence reduced.

No. 4.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

DHANPAT MAL AND MILKHI RAM—(CONVICTS)—
PETITIONERS,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 1276 of 1910.

Excise Act, XII of 1893, section 49—Sale of charas by a license-holder of "sale-in-bond" to a person on the understanding that he must take out a license before delivery.—Not punishable.

Where a holder of a "sale-in-bond" charas license sold charas in-bond to a person who at the time had no license of any kind for the purchase or sale of the drug, on the understanding that he could not obtain delivery and possession without taking out a license.

Held, that for the purposes of the Excise Act, the sale would not be complete until delivery of the charas to the purchaser or some one on his behalf and that delivery was not effected, by retention in bond in the hands of the

Excise authorities on behalf of a person who could not obtain delivery until he took out a license, and that there was consequently no breach of the license punishable under section 49 of the Excise Act, 1896.

Petition under section 439 of the Criminal Procedure Code, for revision of the order of J. P. Thompson, Esquire, Sessions Judge, Hoshiarpur Division, dated the 25th May 1910.

Dawarka Das, for petitioners.

Broadway, for respondent.

The judgment of the learned Judge was as follows :—

9th Dec. 1910.

SIR ARTHUR REID, C. J.—This application and Criminal Revisions Nos. 1277, 1278 and 1279 of 1910 can be disposed of together, the points involved being identical.

The applicant, who holds a “sale-in-bond” *charas* license has been fined under section 49 of the Excise Act, XII of 1896, for selling *charas* in-bond to one Dasaundhi Mal, who had no license of any kind for purchase or sale of the drug.

It is admitted that the *charas* in question remained in bond, in the hands of the Excise authorities, and that the parties understood that Dasaundhi Mal could not obtain delivery and possession without taking a license. Section 49 prescribes a penalty for the sale, in contravention of section 21 of the Act, of a drug, and section 21 forbids the sale of a drug except under, and in accordance with, the terms of a license.

The applicant's license was admittedly in Form No. IX, under section 20, printed at pp. 30 and 31 of Turner's Excise Act Ed. 1.

One of the conditions of the license is that *charas* shall not be sold to anyone not holding one or other of the kinds of license provided for in rule 12 or a permit of one or other of the kinds referred to in rule 4. Having regard to the facts above stated it cannot, in my opinion, be held that any breach of the license was committed by the applicant.

For the purposes of the Act, the sale would not be complete until delivery of the *charas* to the purchaser or some one on his behalf, and to an unlicensed person delivery was not effected by retention in bond in the hands of the Excise authorities on behalf of a person who could not obtain delivery until he took out a license,

To hold otherwise would, in my opinion, be to strain the law unduly against the subject.

The case is practically on all fours with payment of price on Sunday, and delivery on Monday, of liquor, the sale of which on Sunday was illegal. I allow this application and set aside the conviction and sentence.

So much of the fine imposed as has been realized will be refunded forthwith

Revision allowed.

No. 5.

Before Hon. Mr. Justice Johnstone and

Hon. Mr. Justice Shah Din.

ATAYA—(CONVICT)—APPELLANT,

Versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 581 of 1909.

Confession of one accused—retracted—Admissibility of retracted confession against co-accused—Indian Evidence Act, I of 1872, section 30.

Held, that a retracted confession may be taken into consideration under section 30 of the Evidence Act, as against the persons tried jointly with the confessing accused for the same offence, but that as a general rule such a confession should not be considered as supplying sufficient evidence for the conviction of the co-accused, unless it is corroborated by independent testimony in material particulars affecting such co-accused.

Emperor v. Kehri (1) followed.

Appeal from the order of C. L. Dundas, Esquire, Sessions Judge,

Rawalpindi Division, dated 2nd September 1909.

Beni Pershad, for appellant.

Mukerji, for respondent.

The judgment of the Court was delivered by—

SHAH DIN, J.*

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He (Mr. Mukerji) contends, however, that the missing links in this chain of evidence are supplied by the confession of Ramzan; and he has asked us to take that confession into consideration against Ataya, under section 30 of the Evidence Act, and to maintain his conviction on that basis. The appellant's pleader, on the other hand, urges that as Ramzan had retracted his confession, it cannot, and ought not to, be taken into consideration against his client, under section 30 aforesaid; and he cites the ruling in Criminal Appeal No. 381 of 1906⁽²⁾, in support of his contention. On this point, we agree in the view of the law taken in *Emperor v. Kehri* (1), namely that a retracted confession may

15th April 1910.

⁽¹⁾ (1907) I. L. R 29 All. 434.

⁽²⁾ 28 P. W. R. Cr. (Chet Singh v. The Crown.)

*[Portion only of the Judgment is given, this being all that is required for the purposes of the report. Ed.]

be taken into consideration under section 30 of the Evidence Act, as against the persons tried jointly with the confessing accused for the same offence, but that, as a general rule, such a confession should not be considered as supplying sufficient evidence for the conviction of the co-accused unless it is corroborated by independent testimony in material particulars affecting such co-accused. The weight to be attached to such a confession, apart from or taken in conjunction with corroborative evidence, is, however, a different matter, and no hard and fast rule can be laid down in regard to it; it must vary in each case with special reference to its particular facts and to the intrinsic value of the confession.

In the present case, the confession of Ramzan assigns to Ataya the principal part in the murder of Rasula and in almost all the incidents connected with it, and Ramzan himself occupies only a subordinate position. As we have seen above, the confession is not corroborated by independent testimony in all material particulars so far as Ataya is concerned, and it would therefore be unsafe, in our opinion, to accept it, after its retraction by Ramzan, as sufficient evidence of the guilt of Ataya, under section 30 of the Evidence Act.

Appeal accepted.

No. 6.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, Hon. Mr. Justice Kensington, Hon. Mr. Justice Johnstone, and Hon. Mr. Justice Chevis.

NARAIN DAS AND OTHERS—PETITIONERS,

Versus

MUSAMMAT DURGA DEVI AND OTHERS—(COMPLAINANTS)
—RESPONDENTS.

Criminal Revision No. 1163 of 1910.

Recognition to keep peace—Discharge of defendants—Power of District Magistrate or Sessions Judge to order further inquiry—Accused person—Criminal Procedure Code, sections 107, 119, 437.

Held (approving of 42 P. R. 1905 Cr. (1)) that a person discharged under section 109, Criminal Procedure Code, is not an *accused* person within the meaning of section 437, and that a District Magistrate or Sessions Judge consequently is not competent to pass an order for further inquiry into the case of such person.

24 P. R. 1903 Cr. (2) and 33 P. R. 1905 Cr. (3) overruled.

(1) 42 P. R. 1905 Cr. (Muhammad Khan v. Emperor)

(2) 24 P. R. 1903 Cr. (Manna v. Emperor).

(3) 33 P. R. 1905 Cr. (Chetu v. Gokha Singh).

Revision of the order of O. Parquhar Lumsden, Esquire, District Magistrate, Amritsar, dated 8th August 1910, reversing that of Fakir Sayad Jalal ud-Din, Magistrate, 1st class, Amritsar, dated 3rd June 1910, dismissing complaint in default.

Rambhaji Datta, for petitioners,

Nemo for respondents.

Order of Division Bench (Johnstone and Chevis, JJ.) dated 9th March 1911, submitting case to a Full Bench :—

JOHNSTONE, J.—The point in this case is, whether a person from whom security has been demanded under section 107, Criminal Procedure Code, is an “accused person” so as to permit the District Magistrate or Sessions Judge, as the case may be, to take action under section 437 of the Code, and order further inquiry, should that person have been released or discharged under section 119. There is a distinct conflict of authority in this connection—24 *P. R.* 1903 *Cr.* (1) and 33 *P. R.* 1905 *Cr.* (2) being opposed to 42 *P. R.* 1905 *Cr.* (3). The last named ruling was arrived at apparently without reference to the other two, and the time has come for a pronouncement by a Full Bench. We therefore refer the case to a Full Bench. 9th March 1911.

Full Bench order delivered by—

JOHNSTONE, J.—The question referred to this Full Bench was thus stated in the referring order :— 21st April 1911.

“Whether a person from whom security has been demanded under section 107, Criminal Procedure Code, is an ‘accused person’ so as to permit a District Magistrate or Sessions Judge, as the case may be, to take action under section 437 of the Code and order further enquiry, should that person have been released or discharged under section 119.”

This question was answered in the affirmative in 24 *P. R.* 1903 *Cr.* (1) and 33 *P. R.* 1905 *Cr.* (2) and in the negative in 42 *P. R.* 1905 *Cr.* (3), a conflict of authority which rendered reference to this Bench necessary. We have considered the point and the rulings quoted and also *Velu Jayi v. Chidimbara Velu* (4) and we have arrived at the conclusion that 42 *P. R.* 1905 (3) contains the correct view of the law. The whole question is therein fully discussed and it need not be discussed again.

(1) 24 *P. R.* 1903 *Cr.* (*Manna v. Emperor*).

(2) 33 *P. R.* 1905 *Cr.* (*Chetu v. Gokha Singh*).

(3) 42 *P. R.* 1905 *Cr.* (*Muhammad Khan v. Emperor*).

(4) (1910) *L. L. R.* 33 *Mad.* 65.

It is also not necessary to discuss ground 5 of this revision petition, in which it is urged that the order of the Magistrate in this case amounted to an acquittal, inasmuch as this question does not arise on the reference.

The order of the District Magistrate of 8th August 1910 ordering further enquiry is hereby set aside.

Revision accepted.

No. 7.

Before Hon. Mr. Justice Johnstone.

MUSSAMMAT FATTI—(CONVICT)—PETITIONER,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 19 of 1911.

Kidnaping—wife of one man sold to another with whom she was living—lawful custody—Indian Penal Code, section 361.

Held, that where A. (a Hindu), husband of a girl under 16 years of age, had sold her to another man B, with whom she was living, and petitioner had persuaded her to leave the latter's house and go away with another man, the petitioner was guilty of an offence under section 361 of the Penal Code, inasmuch as B. was at the time the lawful guardian of the girl for the purposes of that section, however immoral and reprehensible the act of A. was, in selling her to B.

Petition under sections $\frac{485}{489}$, Criminal Procedure Code, of the order of Major A. A. Irvine, Sessions Judge, Lahore, affirming the order of Lal Laddu Ram, Magistrate 1st Class, Lahore, dated 3rd August 1910, convicting petitioner and sentencing her to one year's rigorous imprisonment.

Ganpat Rai, for petitioner.

Government Advocate, for respondent.

The judgment of the learned Judge was as follows :—

10th April 1911.

JOHNSTONE, J.—In this case the facts are quite clear. The girl Parbatti was the wife of one Surjan, who, becoming tired of her, sold her to one Sain, a barber. She was living with Sain in Anarkali when she made the acquaintance of one Bishamber Babu, a Sub-Inspector of Police. The girl, being under 16 years of age, is a minor for the purposes of the criminal law. It seems that Bishamber paid the girl illicit attentions and also employed the accused in the present case, a sweeper woman, to urge the girl to leave Sain and go away with him, and on a certain day the accused actually persuaded the girl to leave Sain's house for this purpose. The girl pretends that the accused deceived her by saying that they would go and

see the Museum, but I think it is practically certain that she knew the accused's object was different. It is not necessary to detail the story here. It is enough to say that the accused did actually take away the girl from the guardianship of Sain, and as she is a minor, the only question for consideration is whether Sain can be said to have been her lawful guardian. Section 361 of the Indian Penal Code runs as follows :—

“Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.”

And an explanation follows in these words :—

“The words ‘lawful guardian’ in this section include any person lawfully entrusted with the care or custody of such minor or other person.”

The question is then, whether Sain was a lawful guardian of the girl Parbatti? Mayne, in discussing the question of the meaning of the words “lawful guardian”, says that the words include not only the parents or relations in whose house the minor lives and is brought up, but any other person with whom the minor resides by the consent, express or implied, of those who have the higher legal right. It seems to me that although the conduct of Surjan in selling the girl to Sain was immoral and reprehensible, nevertheless Sain is the lawful guardian of the girl for the purposes of section 361 of the Indian Penal Code. To hold the contrary would involve the denial of protection to the girl Parbatti altogether. Authority for this view will be found in *Empress v. Pemantle* ⁽¹⁾, where the learned Chief Justice said :—

“We think that the somewhat liberal explanation of the words ‘lawful guardian’ under section 361 is intended to obviate the difficulty which would otherwise arise, if the prosecution were required to prove strictly in cases of this kind that the person, from whose care or custody a minor had been abducted

(1) (1882, *I. L. R.* 8. *Cal.* 971.

or kidnapped, came strictly within the meaning of a guardian according to the legal acceptance of that word."

In *Queen v. Buldeo* (1) the circumstances were entirely different from those of the present case. The term "lawful guardian" of course does not include a person who has himself gained possession of the minor by an offence under section 361, I. P. C.

For these reasons I think that the decisions of the Courts below were correct and that Mussammat Fatti has been rightly convicted under section 363 of the Indian Penal Code. The petition is therefore rejected.

Revision rejected.

No. 8.

Before Hon. Mr. Justice Shah Din.

CROWN,

Vers us

GAMAN.

Criminal Revision No. 35 of 1910.

Absconder—locus standi of collateral to have sale of property set aside—Criminal Procedure Code, Act V of 1898, sections 87, 88, and 89.

Held, that the sale of the land of an absconding person made under the provisions of sections 87 and 88 of the Criminal Procedure Code, cannot be set aside at the instance of a collateral of the absconder either by the Magistrate who made the order of sale or by the Chief Court.

Case reported by Major H Foxstrangways, District Magistrate, Jhelum, with his No. 1882 of 22nd December 1910.

Nemo, for Crown.

Sham Lal, for Harnam Singh, Vendee.

The facts of this case are as follows :—

On 14th December 1908 Misr Hira Nand passed an order under section 88, Criminal Procedure Code, ordering the attachment of the property of one Gaman who had absconded. Subsequently the absentee's land, in which he had occupancy rights under section 6 of the Tenancy Act was attached and sold by order of the District Magistrate, dated 16th June 1910, to Harnam Singh, a Khatri.

The reversioner Karm Bakhsh has applied that the order sanctioning the sale may be set aside and that the tenancy may be sold to him.

(1) (1870) 2 N.W. P. High Court R. 286.

The accused's land in which he had occupancy rights under section 6 of the Tenancy Act was attached and sold by order of the District Magistrate, Jhelum, dated 16th June 1910, to Harnam Singh, a Khatri.

The proceedings are forwarded for revision on the following grounds :—

The life interest only of the absconder is sold and it is better that it should be sold to the person who will eventually succeed. This person is a member of an agricultural tribe which the present vendee is not.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—The facts of this case, [which has been reported 20th March 1911.] by the District Magistrate, Jhelum, for the orders of this Court, under section 438, Criminal Procedure Code, are as follows :—One Gaman who was accused of an offence under section 176, I P. C., absconded in order to avoid service of a warrant which had been issued against him. A proclamation having been duly issued under section 87 of the Criminal Procedure Code on the 30th January 1909, his property was ordered to be attached under section 88; and on the 12th June 1910 certain occupancy rights which he held under section 6 of the Tenancy Act in the village of Ghuga were sold by order of the District Magistrate to one Harnam Singh, a Khatri. On the 16th June Karam Bakhsh, a collateral of Gaman made an application praying that the order sanctioning the sale may be set aside and that the occupancy rights in question be sold to him. The District Magistrate has forwarded the proceedings for the orders of this Court, and has recommended that as the applicant is a member of an agricultural tribe and as Harnam Singh to whom the occupancy rights of Gaman have been sold, is a non-agriculturist, the sale to the latter be set aside by this Court, so that a fresh sale might be made in favour of Karam Bakhsh.

Counsel for Harnam Singh, vendee, urges that there is no provision of law under which this Court, acting in the exercise of its powers under section 439, Criminal Procedure Code, can set aside the sale of occupancy rights which belonged to the absconder Gaman and I think that this contention is well founded.

Section 89 of the Code provides for application by the absconding offender only for restoration of the property attached and no provision is made for claims by third parties to such property. The sale of the property, once it has been duly

effected, cannot be set aside even at the instance of the absconder; who, in the event of his property being sold, is only entitled to receive the nett proceeds of the sale, provided he satisfies the conditions laid down in section 89. *A fortiori* a third party, who is a stranger to the proceedings in which the proclamation was issued, has no right to apply to the Magistrate, by whose order the property of the absconder was attached and sold, to set aside the sale thereof; and the Magistrate has no power under the Criminal Procedure Code to make an order cancelling such sale. In *Abdullah v. Jitu* (1) it was held that where property was attached and sold as the property of a proclaimed offender under sections 87 and 88 of the Criminal Procedure Code, the sale could not be set aside even on the application of the absconder although the proclamation was irregular. It was observed that the High Court as a Court of revision had no power to pass an order affecting the title of third persons in whom the property had legally vested under a Court sale and who were strangers to the proceedings held under sections 87 and 88 of the Code.

The case of the present vendee, Harnam Singh, is stronger than that of the vendees in the Allahabad case, for here it is a collateral of the absconder Gaman and not Gaman himself, who is applying for the sale of his property to be set aside. I am unable to see what *locus standi* the applicant has to make such application under the Criminal Procedure Code, nor do I find any provision of law under which the application can be granted by the Magistrate who made the order of sale or by this Court.

Let the record be remitted to the District Magistrate.

No. 9.

Before Hon. Sir Arthur Reid, Kt. Chief Judge, and Hon.
Mr. Justice Johnstone.

CROWN

Versus

UMDA (ACCUSED).

Criminal Case No. 148 of 1911.

Confession by co-accused while witness in the case—if irrelevant, not admissible against other accused—Evidence Act, sections 24 and 30.

Held, that a confession by an accused person, found to be irrelevant under section 24 of the Evidence Act, cannot be proved and therefore cannot be used against a co-accused under section 30 of the Act.

(1) (1900) I. L. R. 22 ALL. 216.

Held also, that a confession made by an accused person while he was a witness in the case, in which he was subsequently impleaded as an accused person, stands on the same footing in this respect as if it had been made by him as an accused person.

*Case reported by Colonel S. S. Beadon, Sessions Judge, Amballa,
with his No. 181 S. of 25th January 1911.*

Nemo, for Accused.

Nemo, for Crown.

The facts of this case are as follows :—

A house was broken into at night and certain property was stolen. During the Police investigation Kalu stated that he and Umda had committed the burglary and on search some stolen property was recovered from Umda's possession.

The Police sent Umda alone up for trial but also sent Kalu to Court as a witness for the prosecution.

In his evidence, as a witness in the case, Kalu gave the same story implicating himself and Umda, and on this the Magistrate transferred Kalu from the witness box to the dock and proceeded to try him and Umda jointly for the offence.

Both Kalu and Umda were convicted and Umda's appeal was rejected on 11th November 1910.

In Kalu's subsequent appeal which has just been decided (No. 402 of 1910) Kalu has been acquitted on the ground that his statement is irrelevant under section 24 of the Evidence Act (*vide* judgment in appeal No. 402 of 1910).

The accused on conviction by Lala Mukand Lal, exercising the powers of a Magistrate of the 1st class in the Karnal District, was sentenced by order, dated 3rd October 1910, under section 457 of the Indian Penal Code to one year's rigorous imprisonment including two months' solitary confinement.

The proceedings are forwarded for revision on the following grounds :—

On deciding Kalu's appeal I have great doubt as to whether or not the conviction of Umda is legal. His conviction rests mainly on the statement of Kalu which I have found to be irrelevant as against Kalu. As Kalu and Umda were tried jointly in one and the same proceedings the inference is that a statement irrelevant in those proceedings against Kalu is entirely irrelevant and cannot be used against Umda. The statement, however, was made as a witness before Kalu became a co-accused and as it is corroborated by the fact that

stolen property was found in possession I am inclined to think that Umda's conviction is sound, *vide* section 133 of the Evidence Act.

The point, however, appears to me to be extremely doubtful and I think it my duty to refer the case to the Chief Court on the revision side for orders.

The judgment of the Court was delivered by—

8th May 1911.

SIR ARTHUR REID, C. J.—The facts are stated in the learned Sessions Judge's referring order.

The question for consideration is whether the statement of Kalu recorded when he was examined as a witness for the prosecution at the trial of Mangu is excluded from consideration against Mangu by section 24 of the Evidence Act.

The learned Sessions Judge has found that the statement of Kalu which constitutes a confession of his guilt of the offence for which Mangu was being tried was induced in one of the manners specified in section 24 of the Act. We see no reason for differing from this finding.

Although Kalu was not, when examined as a witness, an accused person he was subsequently accused and tried jointly with Mangu; and his statement was a confession. He was an accused person at the time at which his confession was used against Mangu, *i. e.*, at the termination of the trial, and in our opinion, the test of relevancy is whether the statement was relevant under section 30 of the Evidence Act. Section 24 provides that an induced confession by an accused person is irrelevant in a criminal proceeding. The trial was a criminal proceeding and the irrelevancy is not limited to the case of the accused person who confessed but extends to the whole proceeding including the case of the co-accused. Section 30 provides that a confession which has been proved may be used against a co-accused, but if the confession is irrelevant it cannot be proved and a confession irrelevant under section 24 cannot be taken into consideration against the co-accused.

Section 133 of the Act, cited by the learned Sessions Judge, does not in our opinion, affect the question, inasmuch as it applies only to relevant statements by an accomplice. The accomplice is not an accused person but a witness.

For these reasons we hold that the statement of Kalu is excluded by section 24 and we set aside the order dismissing Umda's appeal and return the record for disposal of the appeal.

Full Bench.

No. 10.

Before Hon. Sir Arthur Reid, Kt. Chief Judge, Hon. Mr. Justice Kensington and Hon. Mr. Justice Shah Din.

EMPEROR—APPELLANT,

Versus

KIRU — (ACCUSED)—RESPONDENT.

Criminal Appeal No. 409 of 1910.

Discharge—legality of—further enquiry—Magistrate whose order of discharge has not been set aside by higher authority—when further enquiry should be made—Criminal Procedure Code, Act V of 1898, section 437.

Held, that when a Magistrate has passed an order discharging an accused person it is competent to the same Magistrate or to another Magistrate of co-ordinate jurisdiction to take fresh proceedings against the accused upon the same facts although the order of discharge has not been set aside by higher authority.

But held also, that generally speaking further inquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete.

33 P. R. 1894 (1) dissented from.

Appeal from the order of Rai Sahib Bhagat Narain Das, Sessions Judge, Hissar Division, dated the 19th March 1910.

Government Advocate, for appellant.

Respondent, in person.

The law point involved was referred to a Full Bench by the following order of Division Bench (Shah Din and Chevis, JJ.) :—

The judgment of which was delivered by—

SHAH DIN, J.—This is an appeal by the Local Government 10th April 1911. under section 417, Criminal Procedure Code. The facts of the case are briefly as follows :—

In the year 1909 some brass utensils belonging to one Mus-sammat Pato were stolen. After some months they were discovered in the possession of one Taida mahajan who informed the complainant that they had been pawned with him by the respondent Kiru; a report was made to the police, and in due course the respondent was *challaned* to the Court of Lieutenant Stanley Skinner, Magistrate of the 2nd class, Hansi, to stand his trial for an offence under section 411, Indian Penal Code. The Magistrate by his order dated the 18th January 1910 discharged the respondent of an offence under section 411

(1) 33 P. R. 1894 (*Jowahir Singh v. Queen-Empress*).

but added that he should be sent up by the police for trial under section 379, Indian Penal Code. The police accordingly again *challaned* the respondent under sections 454 and 411, Indian Penal Code, though not under section 379 as directed. The respondent was duly tried by M. Zaka-ud-Din Khan, Magistrate, 1st class, Hissar, and was found guilty and convicted of an offence under section 411, Indian Penal Code. On appeal the Sessions Judge has held on the authority of No. 33 P. R. 1894 Cr. (1) that the respondent having been discharged of an offence under section 411, Indian Penal Code, by Lieutenant Skinner, Magistrate, 2nd class. M. Zaka-ud-Din, Magistrate, 1st class, was not competent to ignore the first Magistrate's order of discharge and upon the same facts to convict the respondent of the very same offence in respect of which an order of discharge had been recorded without that order having been set aside by higher authority. The learned Judge has accordingly set aside the conviction and sentence of the respondent and has acquitted him. From that order of acquittal the local Government has preferred this appeal; and in support of it the learned Government Advocate has contended that the decision of this court relied upon by the Sessions Judge is erroneous, and that the Magistrate, 1st class, was quite competent, without the previous order of discharge recorded by the 2nd class Magistrate being set aside by this court, to re-open the inquiry and to convict the respondent of an offence under section 411, Indian Penal Code. In support of this position reliance is placed upon the following authorities:—

Bidhu Chandalini v. Mati Sheikh Mondal (2), *Queen-Empress v. Dolegobind Dass* (3), *Dwarka Nath Mondal v. Beni Madhab Banerjee* (4), *Mir Ahmad Hossein v. Mahomed Askari* (5), *Jyotindra Nath Daw v. Hem Chandra Daw* (6), *Emperor v. Chinna Kaliappa Goundon* (7), *Emperor v. Maheswara Kondaya* (8), *Queen-Empress v. Puran* (9), *Emperor v. Mehrban Husain* (10), *Queen-Empress v. Umedan* (11), *Emperor v. Nabi Fakira* (12).

(1) 33 P. R. 1894 Cr. (*Jowahir Singh v. Queen-Empress*).

(2) (1901) I. L. R. 28 Cal. 102.

(3) (1901) I. L. R. 28 Cal. 211.

(4) (1901) I. L. R. 28 Cal. 652 F. B.

(5) (1902) I. L. R. 29 Cal. 726 F. B.

(6) (1909) I. L. R. 36 Cal. 415.

(7) (1906) I. L. R. 29 Mad. 126.

(8) (1908) I. L. R. 31 Mad. 543.

(9) (1887) I. L. R. 9 All. 85.

(10) (1907) I. L. R. 29 All. 7.

(11) (1895) All. W. N. 86.

(12) (1907) 9 Bom. L. R. 250

In *Bidhu Chandalini v. Mati Sheikh Mondal* (1), a complaint was filed in respect of offences under sections 341, 323, 447, and 426, Indian Penal Code, in the Court of the District Magistrate, who, after having issued summons to the accused, dismissed the case under section 259, Criminal Procedure Code, owing to the complainant being absent when the case was called on. Subsequently on the application of the complainant the District Magistrate revised the case, and made it over to an Honorary Magistrate for trial. It was held by the Calcutta High Court that section 437, Criminal Procedure Code, did not limit the power of a District Magistrate to make, or order a subordinate Magistrate to make, further enquiry into a case in which an order of dismissal or discharge might have been passed by a subordinate Magistrate; and that there was no bar to a District Magistrate making further inquiry into a case in which such order might have been passed by himself. This decision, which was approved of by our own Court in No. 9 P. R. 1902 (Criminal) (2), is not directly in point so far as the power of a Magistrate other than the District Magistrate to proceed upon a fresh complaint is concerned, and it need not therefore be noticed further.

In *Queen-Empress v. Dolegobind Dass* (3), the question for decision was whether it was competent to a Chief Presidency Magistrate to try an accused person upon further and fresh evidence in a case where he had already been discharged by a Bench of Presidency Magistrates in respect of an offence under section 381, Indian Penal Code, without the order of discharge being set aside by higher authority. Maclean, C. J., held that the accused could be so tried, because there was no express provision in the Code of Criminal Procedure to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertained so long as the order of discharge remained unreversed. This case also is not a direct authority in support of the position which the learned Government Advocate has sought to establish inasmuch as section 437, Criminal Procedure Code, does not apply to Presidency Magistrates and it cannot therefore preclude a Chief Presidency Magistrate from trying an accused person, who has already been discharged by a Presidency Magistrate, upon the same set of facts without the order of discharge being previously set aside.

(1) (1901) I. L. R. 28 Cal. 102.

(2) 9 P. R. 1902 Cr. (Emperor v. Munshi).

(3) (1901) I. L. R. 28 Cal. 211.

The Full Bench decision in *Dwarka Nath Mondal v. Beni Madhab Banerjee* (1), is similarly distinguishable, in that it lays down that a Presidency Magistrate is competent to rehear a warrant case triable under Chapter XXI of the Code of Criminal Procedure in which he has himself discharged the accused person. Although, therefore, the question was not directly before the High Court, Maclean, C. J., incidently expressed the opinion that a Mofussil Magistrate had the same power as a Presidency Magistrate to rehear a case in which the accused person had been discharged. After saying that upon the question referred to the Full Bench he saw no reason for changing the opinion expressed by him in *Queen-Empress v. Dolegobind Dass* (2) he went on to observe: The argument in this case, "however, has led me to doubt, whether the principle I have enunciated ought not to be held to apply to the case of a Mofussil Magistrate, equally with that of a Presidency Magistrate, and whether the authorities which would appear to decide the contrary are well founded in law. That question "is not before us to-day." The learned Judges of the High Court recorded reasons for their opinions at great length, Ghose, J. delivering a dissentient judgment, in which he held, relying mainly upon the provisions of section 437, Criminal Procedure Code, that where a Magistrate after taking evidence makes an order of discharge, he is not competent to review or alter it and make further inquiry without the order of the superior Court.

The later Full Bench case, *Mir Ahmad Hossein v. Mahomed Askari* (3) is directly in point. There it was held by a majority of 4 Judges (Ghose, J., dissenting) that a Magistrate in a warrant case having passed an order of discharge was competent to take fresh proceedings and issue process against the accused in respect of the same offence, without an order of further inquiry being passed under section 437 Criminal Procedure Code having the effect of setting aside such order of discharge. Maclean, C. J., and the other Judges who agreed with him were of opinion that the case before them was virtually governed by the Full Bench decision in *Dwarka Nath Mondal v. Beni Madhab Banerjee* (1), as according to them, there was no distinction in principle, upon the correct construction of section 437, Criminal Procedure Code, between a Presidency Magistrate and a

(1) (1901) I. L. R. 28 Cal. 652 F. B.

(2) (1901) I. L. R. 28 Cal. 211.

(3) (1902) I. L. R. 29 Cal. 726 F. B.

Mofussil Magistrate as regards the jurisdiction of each to take fresh proceedings against an accused person who had already been discharged either by the same Magistrate or by another Magistrate of co-ordinate jurisdiction without the order of discharge being set aside by higher authority. Ghose, J., on the contrary, held that an order of discharge when once made by a Magistrate could only be altered and the prosecution revised by an order of a Superior Court.

The decision in *Jyotindra Nath Daw v. Hem Chandra Daw* (1) simply follows the Full Bench ruling above cited, as it was there held that a Subordinate Magistrate, who had dismissed a complaint under section 203 of the Code of Criminal Procedure, was competent to revive it notwithstanding that the District Magistrate had refused to order further inquiry in the matter on application made to him for that purpose.

In *Emperor v. Chinna Kaliappa Goundon* (2) the majority of the Full Bench dissented from the ruling of their own Court in *Mahomed Abdul Mennan v. Panduranga Row* (3), and following the decision of the majority of the learned Judges of the Calcutta High Court in the Full Bench cases *Dwarka Nath Mondal v. Beni Madhab Banerjee* (4), and *Mir Ahmad Hossein v. Mahomed Askari* (5) hold that the dismissal of a complainant under section 203, Criminal Procedure Code, did not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such order of dismissal had not been set aside by a competent authority. Subrahmaniam Ayyar and Davies, JJ., dissented from this conclusion, a lengthy judgment being recorded in support of his opinion by Mr. Justice Subrahmaniam Ayyar. Although the question directly before the Madras High Court in this case related to the rehearing of a complaint which had been dismissed under section 203 Criminal Procedure Code, the learned Chief Justice incidentally discussed the case of the discharge of an accused person under section 253 or 259 of the Code. At page 136 of the report he says "the case before us relates only to an order of dismissal under section 203 and for the purposes of the case it is enough to say that in my opinion it is open to a Magistrate to rehear a complaint which he has dismissed by an order of dismissal under section 203, although the order has not

(1) (1909) I. L. R. 36 Cal. 415.

(2) (1908) I. L. R. 29 Mad. 126.

(3) (1905) I. L. R. 28 Mad. 255.

(4) (1901) I. L. R. 23 Cal. 652 F. B.

(5) (1902) I. L. R. 29 Cal. 726 F. B.

“been set aside by a higher Court. I may add, however, that, as regards the point which has been under consideration in this case, I do not think that any distinction can be drawn between an order made under section 203 and an order made under section 253 or section 259.”

In *Emperor v. Maheswara Kondaya* (1), a Division Bench of the same High Court had to consider the effect of an order of discharge passed by a Magistrate under section 253 of the Code of Criminal Procedure so far as the competency of that Magistrate to take fresh proceedings against the same person for the same offence was concerned, and it was ruled that it was competent to such Magistrate to take fresh proceedings and issue process against the accused person without the order of discharge being set aside by a higher Court.

In *Queen-Empress v. Puran* (2), it was laid down by a single Judge of the Allahabad High Court that a Magistrate ordering further inquiry or receiving a second petition from the complainant, whose first complaint against the same person for the same offence had been dismissed by him under section 203, Criminal Procedure Code, did not act contrary to any provision of the law. This decision was followed by a Division Bench of the same High Court in *Queen-Empress v. Umedan and others* (3), in which it was held that a Magistrate, who had passed an order dismissing a complaint, had power, at the instance of the complainant and without direction from superior authority, to take cognizance of the same offence or of any other offence constituted by the same facts upon a second proper complaint being laid before him. This decision has since been followed in *Emperor v. Mehrban Husain* (4) in which Mr. Justice Richards lays down that there is nothing to prevent a Magistrate from entertaining a second complaint made against the same person, even though the second complaint may be connected with the previous complaint which has already been dismissed under the provisions of section 203 of the Code of Criminal Procedure. The Full Bench decisions of the Calcutta High Court in *Dwarkanath Mondal v. Beni Madhab Banerjee* (5), and *Mir Ahmad Hossein v. Mahomed Askari* (6), are cited with approval. In the case of *Emperor v. Nabi Fakira* (7)

(1) (1908) I. L. R. 31 Mad. 543.

(2) (1887) I. L. R. 9 All. 85.

(3) (1895) All. W. N. 86.

(4) (1907) I. L. R. 29 All. 7.

(5) (1901) I. L. R. 28 Cal. 652 F. B.

(6) (1902) I. L. R. 29 Cal. 728 F. B.

(7) (1907) 9 Bom. L. R. 250.

the question for decision was whether under the provisions of the Code of Criminal Procedure the recording of reasons was necessary where an accused person was discharged after the trying Magistrate had heard all the evidence for the prosecution, and in holding that the writing of such reasons was not necessary, the learned Judges of the Bombay High Court said :—

“ It is on the termination of a trial that judgment has to be pronounced. A judgment is a decision which decides a case finally so far as the court trying the case is concerned, but an order of discharge is not a final order because there is nothing to prevent a Magistrate, if he has once discharged an accused person under section 253, from inquiring again into the case against him. A discharge, not operating as an acquittal leaves the matter at large for all purposes of judicial inquiry. There is jurisdiction still vested in all Magistrates including the one who made the previous inquiry just as before.”

And they cited with approval an unreported criminal case of their own court *Queen-Empress v. Bapuda*, and also the Full Bench decision of the Calcutta High Court in *Mir Ahmad Hossein v. Mahomed Askari* ⁽¹⁾.

All the above decisions more or less support the position taken up by the learned Government Advocate in this case, but the contrary view was held by Sir Meredyth Plowden in No. 33 P. R. 1894 (Criminal) ⁽²⁾. That was a case in which a complaint was filed under section 406, Indian Penal Code, in the Court of a Cantonment Magistrate, and subsequently on the application of the complainant, who stated that the parties had mutually agreed to refer their dispute, as set out in the written complaint, to arbitration, the Magistrate directed that the accused be released and the case be filed. A year later the complainant filed a second complaint under section 406, Indian Penal Code, on the same facts stating that the arbitration had fallen through. Thereupon the Magistrate issued a second warrant under which the accused was arrested and was placed on his trial. On a question being raised as to whether the Magistrate was competent to take fresh proceedings against the accused person upon the same facts as were set out in his first complaint without the Magistrate's order of discharge being set aside by higher authority under section 437, Criminal Procedure Code, it was held by Sir Meredyth

⁽¹⁾ (1902) I. L. R. 29 Cal. 726 F. B.

⁽²⁾ 33 P. R. 1894 Cr. (*Jowahir Singh v. Queen-Empress*);

Plowden that the Magistrate could not ignore his order of discharge and re-open an inquiry into the case. After discussing the question whether the order releasing the accused and filing the case amounted in fact and in law, to an order of discharge, and after holding that it did amount to such an order, the learned Judge went on to observe: "I do not understand the Magistrate to decide that, if the order of January 22nd is one of discharge, he is competent to proceed on the present complaint. In my opinion, he clearly is not competent to do so, until his order of discharge of January 22nd 1892, is set aside by higher authority. It is a necessary inference from the terms of section 437, read with its context, that a Magistrate is not competent to ignore his own order of discharge, and re-open an inquiry into the case of an accused person whom he has discharged."

Any opinion expressed by Sir Meredyth Plowden is entitled to great weight; but it will be observed that in coming to the conclusion in the above case that the Magistrate was not competent to take fresh proceedings against the same accused person upon the same set of facts without his order of discharge being set aside by higher authority under section 437 of the Criminal Procedure Code, the learned Judge did not discuss the question in all its bearings with special reference to the provisions of the Code relating to the initiation of proceedings (section 191 of the Code of 1882, which corresponds to section 190 of the present Code) and to those of Chapter XXX of the Code relating to the effect of a previous acquittal or conviction as a bar to a subsequent trial. In the Full Bench cases of the Calcutta High Court *Dwarkanath Mondal v. Beni Madhab Banerjee* ⁽¹⁾ and *Mir Ahmad Hossein v. Mahomed Askari* ⁽²⁾ as also in the Full Bench case of the Madras High Court, *Emperor v. Chinna Kaliappa Goundon* ⁽³⁾, the bearing of section 403 and section 437, Criminal Procedure Code, upon the question under consideration is very fully discussed both by the majority of the Judges constituting the Full Bench and by the dissentient minority; and with the greatest possible respect to the learned Judges who have taken the contrary view, we think that the better opinion to hold is that an order of discharge made by a Magistrate, which is not set aside by higher authority, does not operate as a bar to his taking fresh proceedings and issuing fresh process against the accused person upon the same set of

⁽¹⁾ (1891) *I. L. R.* 28 *Cal.* 652 *F. B.*

⁽²⁾ (1902) *I. L. R.* 29 *Cal.* 726 *F. B.*

⁽³⁾ (1906) *I. L. R.* 29 *Mad.* 126.

facts and for the same offence. With regard to the effect of section 437, Criminal Procedure Code, on the question before us, Maclean, C. J. in *Mir Ahmat Hossein v. Mahomed Askari* ⁽¹⁾ says (at page 731) "I do not think that section 437, which is "an enabling section, by implication takes away the jurisdiction which, I think, is vested in the Magistrate in a case of "this class to hear the complaint again." Similarly, in *Emperor v. Chinna Kaliappa Goundon* ⁽²⁾ Sir Arnold White observes (at page 134);—"In the cases in which the view has been "taken that a Magistrate has no jurisdiction to rehear, the "judgments proceed mainly upon the ground that, having "regard to the provisions of section 437 which gives power "to the higher courts to make further inquiry into a complaint "which has been dismissed, the legislature cannot have intended "that the tribunal which deals with the case in the 1st "instance should have the power to rehear. Now, section 437 "is an enabling section enacted for the purpose of giving "powers of control and revision to the higher courts. I cannot "see how the conferring of such powers can be said to operate "so as to cut down the jurisdiction of the court which deals "with the case in the 1st instance."

The provisions of section 403 of the Criminal Procedure Code have a material bearing on the question under consideration. As observed by the learned Judges of the Allahabad High Court in *Queen-Empress v. Umedan and others* ⁽³⁾, that section is the only section of the Code which provides that a person once tried for an offence should not be tried for the same offence or any other offence constituted by the same facts which he may have committed so long as the trial and the order passed on the trial hold good. In the explanation which forms part of the same section it is laid down that the dismissal of a complaint or the discharge of the accused is not an acquittal for the purposes of the section so as to bar a subsequent trial. The section which confers upon Magistrates power to take cognizance of offences is section 190 of the Code, and looking to the terms of that section and section 403 there is nothing in the law which prohibits a Magistrate, who had dismissed a complaint under section 203 or discharged an accused person under section 253 or section 259, from taking fresh proceedings against him, should he upon a second complaint consider that there is good ground for so proceeding.

⁽¹⁾ (1902) *I. L. R.* 29 Cal. 726 F. B.

⁽²⁾ (1908) *I. L. R.* 29 Mad. 126.

⁽³⁾ (1895) *All. W. N.* 86.

The order of dismissal or discharge could obviously not be pleaded as a bar to such fresh proceedings under section 403, and there is no other provision of the Code which interposes any such bar. "There is no express provision of the Code," says Sir Arnold White in *Emperor v. Chinna Kaliappa Goundon* ⁽¹⁾ "which in express terms either gives or takes away the jurisdiction to inquire into an alleged offence with regard to which a complaint has been brought and has been dismissed. But in my opinion the Code implicitly, though not directly gives the jurisdiction. The explanation to section 403 enacts that the dismissal of a complaint is not an acquittal for the purposes of that section. The purpose of the section is to protect the person who has been acquitted from liability to be tried for the same offence. The explanation says that in the case of a dismissal he is not so protected. No doubt the section only applies to the case of a person who has been tried and in the case of dismissal there had been no trial. Strictly speaking neither the section nor the explanations apply to a dismissal; but it seems to me clear, that what the legislature meant to lay down was that a dismissal is not a bar to further proceedings in respect of the alleged offence, and that the right to take further proceedings is not dependent upon the exercise by the High Courts of the powers of revision conferred by the Code. If there is no bar to further proceedings, there is jurisdiction to entertain, these further proceedings; and if there is this jurisdiction there is nothing in the Code which deprives a Magistrate of jurisdiction by reason of the fact that he has made an order dismissing the complaint. That this is the true construction of the explanation to section 403 seems to me clear when we read the explanation by the light of the corresponding enactments contained in the Code of 1872."

The above observations apply with equal force to a case in which an accused person has been discharged by a Magistrate under section 253 or section 259 of the Code of Criminal Procedure and the order of discharge is not set aside by higher authority under section 437 of the Code.

Upon a careful consideration of the published decisions of the different High Courts, we are disposed to think that the view taken by Sir Meredyth Plowden in No. 33 *P. R.* 1894 (Criminal) ⁽²⁾ is not sustainable, and as it is desirable to have

⁽¹⁾ (1908) *I. L. R.* 29 *Mad.* 126.

⁽²⁾ 33 *P. R.* 1894 *Cr.* (*Jowahir Singh v. Queen-Empress*).

an authoritative ruling by this Court on the point involved in the present case, which should set the matter at rest as far as this Province is concerned, we refer the following question to a Full Bench for decision;—

Where a Magistrate has passed an order discharging an accused person, is it competent to the same Magistrate or to another Magistrate of co-ordinate jurisdiction to take fresh proceedings against the accused upon the same facts without the order of discharge being set aside by higher authority?

The judgment of the Full Bench was delivered by—

KENSINGTON, J.—The question directly referred to a Full Bench has been discussed so fully in the order of reference that we have little to add. There is a great weight of authority in favour of the view that it is not necessarily illegal to undertake a fresh enquiry against an accused person who has been discharged, even where the order of discharge has not been dealt with by higher authority under section 437, Criminal Procedure Code. We do not think that it makes any difference whether the further enquiry is held by the Magistrate who passed the original order of discharge, or by another Magistrate of co-ordinate jurisdiction.

2nd June 1911.

Our reply to the reference is therefore in the affirmative. We think that the previous ruling of this Court to the contrary contained in No. 33 P. R. 1894 (Criminal) ⁽¹⁾, is expressed too broadly. We cannot endorse that ruling to the extent of saying that the law prohibits such further enquiry or that there is any invariable rule of practice on the point. The Division Bench ruling No. 9 P. R. 1902 ⁽²⁾ is in favour of the view which we now take, though the point then under discussion was not the same.

At the same time we desire it to be clearly understood that though such further enquiry is not actually illegal, it should be only undertaken in exceptional cases and for good reason shown. This Court has often pointed out that when a man is discharged under circumstances which make the order of discharge equivalent to one of acquittal no further proceedings should be taken against him under section 437, Criminal Procedure Code. The rulings to which we here refer are No. 8 P. R. 1900 Cr. ⁽³⁾, No. 2 P. R. 1901 Cr. ⁽⁴⁾, and No. 8

⁽¹⁾ 33 P. R. 1894 Cr. (*Jowahir Singh v. Queen-Empress*).

⁽²⁾ 9 P. R. 1902 Cr. (*Emperor v. Munshi*).

⁽³⁾ 8 P. R. 1900 Cr. (*Jai Ram v. Mukhan Lal*).

⁽⁴⁾ 2 P. R. 1901 Cr. (*Dulla v. The Empress*).

P. R. 1909 Cr. (1). No invariable rule can be laid down, but speaking generally, further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish, or was based upon a record of evidence which was obviously incomplete. The rulings last quoted specifically cover orders under section 437 of the Code and they apply *à fortiori* to cases where no action has been taken under that section. We cannot say more by way of general guidance as so much depends on the particular circumstances under which an order of discharge has been given, but if Magistrates use the discretion vested in them by law they are expected to do so with common sense and with due regard to the general consideration that an accused should not be unduly harassed by further proceedings undertaken without good cause.

* * * * *

[The remainder of the judgment deals with the question of appeals under section 417, Criminal Procedure Code, and is not material for purposes of this report.—*Ed.*]

No. 11.

Before Hon. Mr. Justice Rattigan.

GIRDHARI LAL—(CONVICT)—PETITIONER,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 285 of 1911.

Criminal revision—rule as to finding of fact—charges against Government servant under section 161, Penal Code—proper sanction of Government—charge for receiving lump sums—examination of complainant—concurrent punishment in respect of similar offences tried separately—Criminal Procedure Code, Act V of 1898, sections 35, 197, 200 and 537 (a).

Accused, a *siladar* in the Irrigation Department, was convicted of four distinct offences under section 161, Indian Penal Code and in respect of each offence, all being tried separately, was sentenced to 2 years' rigorous imprisonment and a fine of Rs. 1,000, with a direction that the sentences of imprisonment imposed in each case should run concurrently.

Held,

(1) that a direction, that punishments inflicted in respect of distinct offences shall run concurrently, could be made only when the accused was convicted *at one trial* of two or more distinct offences (*vide* section 35, Criminal Procedure Code), and was consequently erroneous in this case;

(2) that although every Magistrate who takes cognizance of an offence upon complaint should ordinarily forthwith examine the complainant on

oath (*vide* section 200 of the Code), a failure to comply with these provisions did not in this case occasion a miscarriage of justice or invalidate the subsequent proceedings, the complaint having been signed by a responsible public official (the Public Prosecutor) and accompanied by a formal sanction of the Local Government, the irregularity was, therefore, cured by section 527 (a) of the Code

(3) that the sanction of Government under section 197 of the Code for the prosecution of the accused was not bad in law merely because it sanctioned prosecution under section 161, Indian Penal Code, "or any other" section of the Code that may be found to be applicable in respect of an "offence briefly described in the Schedule hereto annexed," and the Magistrate trying the case was at liberty to determine whether the facts alleged against the accused constituted an offence under section 161 or any other section of the Penal Code;

(4) that where the facts alleged against the accused were that sums of money were collected by *lambardars* and others from the landholders of the various *chaks* and were paid in each case by them to the accused in a lump sum with the object of inducing him to show favour in his official capacity to those *chaks* as a whole, the charge in each case, of having received a certain lump sum from the *abadkars* of the *chak*, was legal and correct; and

(5) that in revision cases, the well established rule of practice in the Chief Court is "that the orders of Criminal Courts are not to be interfered with "upon the facts save in rare cases and for very exceptional reasons."

Petition for revision under section 439 of the Criminal Procedure Code of the order of Rai Suhb Bhagat Narayan Das, Sessions Judge, Shahpur Division, dated 23rd February 1911.

Grey for petitioner.

Broadway for respondent.

The judgment of the learned Judge was as follows:—

RATTIGAN, J.—The facts of this case and of the connected cases (Criminal Revisions Nos. 286 and 287 of 1911) are set forth so fully and clearly in the judgment of the learned Sessions Judge that it is unnecessary for me to recapitulate them. The petitioner, a *ziladar* in the Irrigation Department, was convicted by a Magistrate of the 1st class, of four distinct offences under section 161, Indian Penal Code, and in respect of each offence (all being tried separately), was sentenced to two years' rigorous imprisonment and a fine of Rs. 1,000. The Magistrate directed, however, that the sentences of rigorous imprisonment imposed in each case should run concurrently, but in so directing obviously overlooked the provisions of section 35 of the Criminal Procedure Code. It is clear from those provisions that a direction that punishments inflicted in respect of distinct offences shall run concurrently, can be made only where the accused is convicted at one trial of two or more dis-

19th April 1911.

tinct offences. The learned Sessions Judge, whose judgment is otherwise a model of careful reasoning and well considered conclusions, has, in his turn, overlooked this error on the part of the Magistrate probably because it was not brought to his notice in the course of argument.

From the orders passed against him in the four cases in which he was convicted, the petitioner preferred appeals to the Sessions Judge, and upon these appeals the convictions were impugned both upon the facts and also upon certain legal grounds which are detailed in the judgment of that learned Judge. The result of these appeals was that the Sessions Judge upheld the convictions in three of the cases, but acquitted the petitioner in one case on the ground that it was not sufficiently proved in that case that the money paid to Chhajju Ram, the petitioner's *munshi*, was so paid with the knowledge of the petitioner. Upon the legal objections that were urged before him, the learned Sessions Judge was of opinion that the contentions of petitioner's counsel were untenable, and must be overruled. The petitioner has now applied to this Court for revision of the judgment and order of the Sessions Judge, and the same legal objections that were overruled in the lower appellate Court have now been once more argued before me. After hearing Mr. Grey at some length in support of these objections, I see no reason to differ from the conclusions of the Sessions Judge and as the latter has dealt with each of these objections exhaustively, I find I have but little to add with regard to them.

The first objection is that when the Magistrate (after adjourning the former proceedings before him *sine die* on being informed that the sanction of the Local Government under section 197, Criminal Procedure Code, had not been obtained), resumed cognizance of these offences on the 13th May 1910, after the sanction of the Local Government had been obtained, he had neither a valid police report nor a complaint before him, and was therefore incompetent, under the provisions of section 190 of the Criminal Procedure Code, to take cognizance of the said offences. The learned Sessions Judge holds that the police report which was before the Magistrate at the earlier stage of the proceedings was not a report on which action could be taken by the Magistrate under section 190, sub-section (1), clause (b), of the Code, inasmuch as at that time the Magistrate had no power to take cognizance of the offences owing to the absence of sanction by the Local Government. Upon this point I do not feel called upon to express

any opinion, as I find that on the 13th May 1910 there was a written complaint, preferred by the Public Prosecutor, filed before the Magistrate, and that it was upon this complaint that the Magistrate directed process to issue to the petitioner and his then co-accused. The complaints filed by the Public Prosecutor are upon the record and upon each of them there is an endorsement by the Magistrate directing proceedings to be taken. In view of this fact, I do not attach any importance to the statement, obviously made in error, in the order of the Magistrate, dated the 1st July 1910, to the effect that he was justified in taking cognizance of the offences because he had the former police report before him. In this latter order he makes no mention of the complaint and it may well be that he had at that time forgotten the existence of the complaint which had been filed on the 13th May. But this lapse of memory on the part of the Magistrate cannot alter the true state of the facts. The Magistrate actually took cognizance of the offences upon *complaint*. This is clear from the record and the mere fact that by some oversight, he subsequently forgot that formal complaints were upon the record and that it was upon those complaints that he had taken action, is, in my opinion, of no material importance. The learned Sessions Judge is in error in saying that these complaints were signed by Ahmad Jan, the Police Inspector, but as they were duly signed by the Public Prosecutor, this error is of no moment. I hold, therefore, that the Magistrate was competent to take cognizance of the offences, so far as section 190 of the Criminal Procedure Code is concerned.

The next objection is that the Magistrate did not examine the complainant upon oath and that this failure to comply with the provisions of section 200 of the said Code is fatal and renders null and void all the subsequent proceedings. There is some force in this objection and I have no hesitation in saying that every Magistrate, who takes cognizance of an offence upon complaint, should, as a matter of ordinary practice, forthwith examine the complainant on oath and reduce the substance of his examination to writing and make the complainant sign the same. This is a very salutary provision of law and Magistrates should be careful strictly to observe it in every case. But I cannot agree that a failure to comply with the provisions of section 200 must necessarily, and in every case, invalidate all subsequent proceedings. The object of the provision is to prevent issue of process in cases, when the examination of the complainant would show that

the complaint was clearly false, frivolous or vexatious, and that further proceedings would tend merely to harass unnecessarily an accused person and waste the time of the Court.

In the present case the complaint was preferred by a responsible public official, was reduced to writing and signed by the said official, and was accompanied with a formal sanction by the Local Government for the prosecution of one of its servants. In these circumstances, and in view of the fact that the accused person has been actually convicted of the offences charged against him, I am of opinion that the Magistrate's failure to observe the strict requirements of section 200 of the Code has not in any way prejudiced the accused or caused a failure or miscarriage of justice and that the irregularity is sufficiently covered by the provisions of section 537 (a) of the Code. The decisions of the Allahabad High Court, *Queen-Empress v. Murphy* ⁽¹⁾ and of the Madras High Court, *Queen-Empress v. Monu* ⁽²⁾ and of this Court (No. 10 P. R. 1896 Cr.) are in point and support my view, and I do not think that an error of this kind can reasonably be regarded, from the point of view of prejudice to an accused person, as of the same nature or moment as a misjoinder of charges.

Mr. Grey's third objection relates to the form in which the sanction by the Local Government to the prosecution of the petitioner was conveyed. This sanction (so far as it affected the petitioner) was in each case (*mutatis mutandis*) to the following effect :—

“ With reference to the provisions of section 197 of the Code of Criminal Procedure, 1898, the Lieutenant-Governor of the Punjab hereby sanctions the prosecution of Pandit Girdhari Lal, son of Pandit Lakhmi Chand, late *ziladar*, of section Akulwala, Jhang Division, Chenab Canal, under section 161 of the Indian Penal Code or any other section of the Code that may be found to be applicable in respect of the offence briefly described in the Schedule, hereto annexed, numbered 1 and 2.

(Sd.) E. MACLAGAN, *Chief Secretary*.

“ Schedule No. 1.—Relating to chak No. 382 J. B.—

“ On or about the 22nd January 1904, accused Girdhari Lal, who then held the post of *ziladar* in the Jhang Branch in the Lyallpur District, unlawfully obtained from zamindars

⁽¹⁾ (1887) I. L. R. 9 All. 666.

⁽²⁾ (1888) I. L. R. 11 Mad. 443.

⁽³⁾ 10 P. R. 1896 Cr. (*Sarb Dyal v. Queen-Empress*).

“and others of Chak No. 382 J. B. the sum of Rs. 250 or thereabouts. This sum was taken as a gratification other than a legal remuneration in respect of his official functions and Girdhari Lal, accused, in taking it, committed an offence under section 161, Indian Penal Code.” Mr. Grey contends that this sanction is vague and indefinite, and that the Local Government by granting sanction to the prosecution of the petitioner of an offence under section 161, Indian Penal Code, “or any other section of the Code that may be found to be applicable in respect of the offence briefly described in the schedule,” practically delegated its functions under section 197, Criminal Procedure Code, to some other person or body, which it had no power to do. The learned Sessions Judge has dealt fully with this contention and I need say no more than that I entirely agree with his conclusions and the grounds upon which they are based. (1). I can myself find nothing vague or indefinite in the sanction. The Local Government, in the schedule, sets forth briefly the alleged facts of the offence and grants sanction for the prosecution of the petitioner, in respect thereof. The sanction and its appendix, the schedule, state that the offence committed by the petitioner, is that punishable under Section 161, Indian Penal Code, but the sanction goes on to provide that if any other section of the Indian Penal Code is found applicable in respect of the said facts, the petitioner may be prosecuted in respect thereof. I agree with the Sessions Judge that this merely means that the Local Government sanctions the prosecution of the petitioner upon a given set of facts and that the Local Government, while itself of opinion that the said facts constitute an offence under section 161, Indian Penal Code, leaves it to the Court (which alone can decide the matter) to determine whether upon these facts the offence falls under section 161 or any other section of the Indian Penal Code.

I can see nothing wrong in the procedure nor can I agree that the petitioner was in any wise prejudiced thereby, especially

(1) Extract from judgment of Sessions Judge on this point:—

“There is a clear distinction between the provisions of section 195 and those of section 197, Criminal Procedure Code. The latter section prescribes no form for the sanction required. In this case the Local Government have specified the facts which constituted the offence and accorded sanction for the prosecution of Girdhari Lal, appellant, on a charge under section 161, Indian Penal Code, and of Gokal Chand, appellant, on a charge under section 382, Indian Penal Code, or under any other section of the Indian Penal Code that may be found to be applicable in respect of the offence briefly described in the schedule annexed. This is a sanction which in my opinion fully meets the requirements of section 197, Criminal Procedure Code, and no objection could be entertained with regard to the language which gives expression to it.”

as he has been actually convicted of an offence under section 161, Indian Penal Code. The two cases relied upon by Mr. Grey are obviously distinguishable. In *Queen-Empress v. Samavir* ⁽¹⁾ the Board of Revenue (to whom the power of granting sanction under section 197, Criminal Procedure Code, had been duly delegated) authorised the Collector to prosecute a Government servant in respect of such offence as *he* thought fit. It was held, and if I may say so, very rightly, that the authority empowered to grant sanction for prosecution under Section 197, Criminal Procedure Code, could not delegate its powers to a third person. The learned Judges in the course of their judgment observed ;—"The sanction required under section 197 " of the Criminal Procedure Code, must be granted with refer- " ence to some specific offence with which the accused is charged " in his capacity as a public servant and the intention of the " Legislature clearly was that the authority empowered to grant " the sanction should take the responsibility of deciding that " there were reasonable grounds for prosecuting such public " servant for such offence. In the resolution of the 24th " August 1892, *the Board does not sanction the prosecution of the " accused for any offence designated by itself, but merely delegates " to the Collector the power of selecting out of several such " charges as he thinks likely to stand investigation.. The Board " has no legal power so to delegate its discretion...A duty is " thrown upon the authority empowered to grant sanction of " designating the offence for which leave to prosecute is given " and this duty cannot be delegated."*

In the present case the Local Government actually designated the offence for which sanction to prosecute was given, and I cannot read into the words of the sanction granted by it a liberty to any person to prosecute the petitioner for any offence which such person may think likely to stand investigation. All that the Local Government has done is to make it clear that it sanctions the prosecution of the petitioner in respect of certain specific acts committed by him, that it considers that these acts are punishable under section 161, Indian Penal Code, but that it leaves it open to the Court to convict him, upon these facts, of any other offence, if in the opinion of the Court some other section of the Indian Penal Code is more relevant thereto than section 161. In my opinion there is no similarity between this case and the one with which the Madras High Court had to deal.

(1) (1893) *I. L. R.* 16 *Mad.* 468.

The other authority upon which Mr. Grey relies, *Barindra Kumar Ghose v. Emperor* (1) is even less in point. The High Court of Calcutta had to deal with a case under section 196 of the Criminal Procedure Code which provides that "no Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code (except section 127) or punishable under section 108 A., or section 153 A., or section 294 A., or section 505 of the same Code unless upon complaint made by order of or under authority from, the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council in this behalf." The offences referred to in this section are all of a very exceptional nature and are all of them offences against the State either in its internal or (section 108 A.) its external relations, and it will be observed that the phraseology of the section is very different from that of section 197. Moreover, while it is competent to a Local Government to empower an officer to grant sanction for the purpose of section 197, it is only the Governor-General in Council, who has authority to empower an officer to order or authorise a complaint under section 196. There is thus in very material respects a substantial distinction between the two sections, and a decision upon the meaning and scope of the former section cannot necessarily be accepted as an authority upon the meaning and scope of the latter. In the case cited the Chief Justice lays considerable stress upon the fact that section 196 relates to offences of a peculiar character. He observes: "The Local Government cannot delegate to any other body or person the controlling power and discretion of determining whether cognizance should be taken by the Court of an offence mentioned in section 196, Criminal Procedure Code, and its judgment must be specifically directed to the particular section and no other, under which the prosecution is to be carried on, and the order or authority should be preceded by a deliberate determination in this respect. An order authorizing a complaint under certain specified sections or under any other section found applicable, if it means found by any one other than Government involves a delegation which can not be sustained. Seeing that this Chapter (*i. e.*, Chapter VI, Indian Penal Code) deals with offences against the State, the policy of this safeguard is manifest; the maintenance of this control is of the highest importance, and it is beyond the competence of the Local Government to delegate to any other

(1) (19 10) I. L. R. 37 Cal. 467.

“body or person this controlling power and the discretion it implies. The question whether action should be taken under Chapter VI is more than a matter of law; considerations of policy arise, and these can only be determined by the authorities specially designated in the section.” I am far from suggesting that the grant of sanction under section 197 is a mere formality or a matter of but trifling importance. Far from it. But it is obvious that the considerations which arise in a case to which section 197 is applicable are essentially different from those considerations of policy, to which the Chief Justice refers and for this reason I cannot regard the case cited as an authority in point. As I am not here concerned with the interpretation of section 196 of the Criminal Procedure Code, it is not for me to say whether the decision of the High Court of Calcutta is right or wrong, but it is somewhat difficult to reconcile it with the ruling of the Bombay High Court in *Bal Gangadhar Tilak's* case ⁽¹⁾. In the latter case, the Government of Bombay ordered a complaint against Tilak “under section 124 A of the Indian Penal Code, and any other section of the said Code which may be found to be applicable to the said case” and the order was upheld by the Court as legal and valid.

For the reasons given, I hold that the sanction granted for the prosecution of the petitioner was good and sufficient for the purposes of section 197, Criminal Procedure Code. It expressly authorised a prosecution under section 161, Indian Penal Code, and the petitioner was charged and convicted under that section.

Mr. Grey laid some stress upon the fact that the Magistrate on resuming the trial after sanction had been obtained at first framed a charge under section 165, Indian Penal Code, and that it was only at a subsequent and much later stage that the charge under section 161, Indian Penal Code, was added. The learned counsel argued that all proceedings prior to the addition of the latter charge were void inasmuch as the Magistrate had taken cognizance of an offence (under section 165, Indian Penal Code), in respect of which the Local Government had not granted sanction for the petitioner's prosecution. But this argument implies that it was not open to the Local Government to leave it to the Court to decide whether the facts alleged against petitioner constituted an offence under section 161 or section 165 or any other section, provided of

⁽¹⁾ (1898) *I. L. R.*, 22 *Bom.* 112.

course that cognizance of any such other offence did not need some peculiar preliminary formality (*i.e.* a complaint under section 196, Criminal Procedure Code) other than the sanction under section 197. With this argument I am unable to agree, and I hold that the Magistrate's proceedings were in no sense void or without jurisdiction. I observe that when the charge under section 161 was added, the accused was given an opportunity of recalling the witnesses and that he actually did recall Mr. Abdul Wahid, Deputy Collector, and cross-examined him at very great length. The accused was then in no way prejudiced by the addition of the charge.

The next contention on behalf of the petitioner is of a twofold character. It is urged that the offence of which the petitioner has been found guilty is that punishable under section 161, Indian Penal Code, and that the theory for the prosecution is that the petitioner accepted gratification other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, from each one of the various persons who contributed towards the fund which Chajju Mal had started on petitioner's behalf. This being so, the petitioner should (according to the argument) have been charged with an offence under section 161 in respect of every item of money contributed by these various persons and that the actual charge against him of having received a certain lump sum of money from the *abadkars* of *chak* so and so, is open to objection on two grounds (1) that it ignores the fact that the petitioner's alleged offence was the doing of something in his official capacity for the benefit of each individual *zamindar* who subscribed to the fund and that he was not alleged to have done or promised to do that thing for the whole *chak*, and (2) that the Court has thereby joined a number of perfectly distinct offences into one general charge, as regards the subscribers of each *chak*. In this connection reliance is placed on the case of *Empress v. Nand Lal* ⁽¹⁾ the head note to which runs as follows :—"Where a bribe was collected from certain inhabitants of a village by subscription and handed over to the recipient in a lump sum it was held that the recipient could not be charged under section 161 of the Indian Penal Code merely with the receipt of the whole sum collected, but that he must be charged in respect of not more than three separate items constituting the total collection." The learned acting Chief Justice (Knox) in the course of his judgment remarked :—"The learned Sessions Judge disposed of this diffi-

(1) (1904) *All. W. N.* 223

"culty in a summary fashion. He considered that in demand-
 "ding a collective sum of Rs. 100 from the villagers of Chaudwa
 "and out of that sum Rs. 31 being collected and paid in a
 "lump sum and the remaining eight rupees shortly afterwards,
 "it was all practically one transaction. In revision the same
 "plea is taken and in my opinion effect must be given to it.
 "I was at first disposed to hold with the learned Judge,
 "that as the money had been collected and then handed over
 "to one Pyare Lal, who took and put it into the hands of
 "Nand Lal, the taking of this might be held to be a distinct
 "offence, but on looking more carefully into the case I find
 "there were two persons on their trial, one the present appli-
 "cant Nand Lal, and the second one Mela Ram a police con-
 "stable, and that these two men were present when certain
 "kisans were told that they must get together Rs. 100 to
 "escape being challaned. The words used in the charge
 "sheet would give the accused and those who appear on his
 "behalf to understand that they had to meet the distinct
 "offence of obtaining from Kundan Rs. 5, from Bhola Rs. 5,
 "from Razai Rs. 5, from Lallu Rs. 5, from Mohan Rs. 5, from
 "Kishen Re. 1 and so forth. To have joined these separate
 "offences in one charge and to have proceeded to try them in
 "one and the same trial was to conduct a trial prohibited by
 "law." With these remarks as they stand, I am in entire
 agreement. To unite in the charge the various and entirely
 distinct offences to which the acting Chief Justice alludes
 would unquestionably be objectionable and render the trial
 illegal. Mr. Grey has filed before me a certified copy of a charge
 drawn up by the Magistrate in the case which came before the
 learned acting Chief Justice, but I cannot believe that this
 was the charge to which that learned Judge refers. It was as
 follows :—" I. A. W. McNair Joint Magistrate, hereby charge
 "you Nand Lal and Mela Ram as follows :—That you on or
 "about the 20th or 21st day of December 1903, did being Govern-
 "ment servants, obtain from certain kisans of Chandwa illegal
 "gratification in the shape of Rs. 39 in order to shew favour
 "in the exercise of your official functions and thereby, com-
 "mitted an offence punishable under section 161 of the
 "Indian Penal Code."

I see no reason to doubt the authenticity of this certified
 copy but I cannot believe that the acting Chief Justice was
 referring to the charge above set forth when he says that the
 words used in the charge sheet would give the accused and
 those who appear on his behalf to understand, that they had

to meet the distinct offence of obtaining "from Kundan Rs. 5, "from Bhola Rs. 5, from Razai Rs. 5, from Lallu Rs. 5, from "Mohan Rs. 5, from Kishen Re. 1, and so forth." Probably the charge was altered at a subsequent stage of the proceedings, but if it was not, if the acting Chief Judge's remarks actually refer to the charge as set forth in the certified copy before me, I must with the greatest respect differ from the learned Judge's interpretation of it, as I cannot understand how the accused or his advisers could reasonably infer from a general charge of that kind that the former was accused of obtaining specific sums of different value from various specified individuals. It is, I think, more reasonable to assume as the judgment suggests that the actual charge upon which the accused was convicted was, not the charge set forth in the certified copy and if this was the case, it is obvious that the decision of the acting Chief Justice is not in point in the case before me. In this case as the Sessions Judge points out, sums of money were collected by *lambardars* and others from the land-holders of the various *chaks* and were paid in each case by them in a lump sum with the object of inducing the petitioner to shew favour in his official capacity to these *chaks* as a whole, and I agree with the Sessions Judge that in the circumstances the charges as framed by the Magistrate, were legal and correct. In this connection I would refer to the case of *Girdwardhari Lal v. King-Emperor* (1) which appears to me to be in point and to support my conclusions. Upon this view it is clear that there was no misjoinder of offences or charges and that the motive of the petitioner was to obtain sums of money from each *chak* by promising to shew favour to the inhabitants thereof generally.

I hold, therefore, that there is no force in any of the legal objections which have been urged before me on behalf of the petitioner. Mr. Grey was anxious to discuss the merits of the three cases in which the petitioner has been convicted, and to argue that it has not been proved that the petitioner had any guilty knowledge of what was being done on his behalf by Chhajju Ram. But I saw no reason in this case to depart from the well established rule of practice observed by this Court that the orders of Criminal Courts are not to be interfered with upon the facts save in rare cases and for very exceptional reasons. I may, however, add that after hearing what Mr. Grey had to say, I see no reason whatever to doubt that the petitioner if he did not actually authorise the actions

(1) (1908) 13 Cal. W. N. 1062.

of his *Munshi*, Chajju Ram was throughout fully aware of what was being done by the latter and approved of the same.

The only question that remains is that of sentence. As I have pointed out in an earlier part of this judgment, the Magistrate was in error in directing that the sentences passed by him in the different trials should run concurrently. On the other hand it is clear that the Magistrate and the Sessions Judge were both of opinion that two years' rigorous imprisonment in all would be a sufficient punishment to the petitioner. In this view I agree. He is a young man and I cannot lose sight of the fact that it was owing to family misfortunes, for which he was apparently in no way responsible, that he was tempted into the commission of these offences. He has permanently lost his employment in Government service and the disgrace of conviction is in itself a grave punishment to a man of his position. Taking all these facts into consideration, I reduce the term of rigorous imprisonment in each of the three cases to six months, the result being that the petitioner will undergo a total term of 18 months' rigorous imprisonment as the sentences will be consecutive. The fines imposed will stand.

Sentence reduced.

No. 12.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and
Hon. Mr. Justice Rattigan.*

GUJJAR—(CONVICT)—APPELLANT,

Versus

CROWN—RESPONDENT.

Criminal Appeal No. 452 of 1910.

Murder—person striking wildly with dangerous weapon without intention of killing anyone—Indian Penal Code, Sections 299 and 301.

Held, that an accused person who breaks into a dwelling house at night and, in order to evade arrest, strikes out "wildly" with a dangerous weapon regardless of the effect of his blows and by so doing actually causes the death of a person is guilty of culpable homicide, as defined in Section 299 (*vide* Section 301 of the Indian Penal Code) notwithstanding that he never intended or knew himself to be likely to cause the death of such person.

*Appeal from the order of T. P. Ellis, Esquire, Sessions
Judge, Ludhiana Division, dated the 15th July 1910.*

Morrison, for appellant.

Mool Chand, for respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—The appellant, Gujjar, a Jat, aged 30 years, 4th March 1911. and three other persons (Bishna, Prema and Mangal) were tried before the Sessions Judge of the Ludhiana Division for offences under Sections 460, 462, and 302 Indian Penal Code, the charges against them being that they did enter, or assist in entering, the house of one Lehna Singh on the night of the 7th March 1900 for the purpose of committing house breaking by night, in the course of which the appellant, Gujjar, is alleged to have caused the death of a child named Santa Singh. After hearing the evidence and at the conclusion of the trial, two of the assessors (Lala Kanwar Sain and Lala Lachman Das) were of opinion that there was no satisfactory evidence to establish the guilt of any of the accused persons. The third assessor (Lala Gokal Chand) on the other hand, was of opinion that "all the accused persons went to commit burglary and that Gujjar entered the house with the *gandasa* and killed Santa Singh, but that he had no intention of killing."

The learned Sessions Judge, agreeing with the majority of the assessors, held that there was no sufficient proof against Bishna, Prema and Mangal, and therefore acquitted them. But differing from the said assessors, and agreeing in this respect with the third assessor, he held that the evidence proved that the appellant had committed lurking house trespass by night and in the course thereof had killed Santa Singh, though he had no intention of either killing or hurting the latter. He accordingly convicted the appellant under Sections 459 and 304 A, Indian Penal Code, and sentenced him to 10 years' rigorous imprisonment.

Gujjar has appealed from this sentence to this Court and we have heard his learned Counsel on his behalf, and Mr. Mool Chand for the Crown in reply.

Before dealing with the facts, we must at the outset observe that the conviction under Section 304 A., Indian Penal Code, is palpably erroneous. Assuming the facts to be as stated in the evidence for the prosecution, we cannot understand how the learned Sessions Judge could hold that section applicable. If a man enters a room, armed with a *gandasa* and, in the words of the Sessions Judge, "strikes out wildly without thinking what he is doing and simply with the intention of covering his own retreat" and without any distinct intention or knowledge that he will "strike any one," he unquestionably commits an offence and does something far more serious than a mere "rash or negligent act not amounting to culpable homicide." In the present case, upon

the prosecution theory, Gujjar commits the offence of breaking into a dwelling house at night and, in order to evade arrest, strikes out "wildly" with a dangerous weapon, utterly regardless of whether his blows will or will not cause death or injury to any one of the inmates. It is absurd to say that in such circumstances the accused person, if he actually causes the death of a person, has acted merely rashly. He has, on the contrary, committed the very serious offence of culpable homicide, as defined in Section 299, Indian Penal Code, for even if it be assumed in his favour that he did not *intend* to cause death, or to cause such bodily injury as was likely to cause death, he knew (or must be taken to have known) that by this very dangerous act he was likely to cause death. No doubt, the appellant, upon the assumed facts, did not intend to cause the death of the unfortunate child, but by hitting out in all directions with the *gandasa* he did some thing which he knew to be likely to cause death to anyone upon whom the *gandas* might have fallen, and the fact that by so doing he actually caused the death of a person whose death he never intended or knew himself to be likely to cause, would merely bring the case within the purview of Section 301, Indian Penal Code.

To a case of this kind Section 304 A. of the Code has, in our opinion, no applicability whatsoever, and the conviction of the appellant should, upon the finding of the Sessions Judge, have been under the second part of Section 304.

* * * * *

[The rest of the judgment is not required for the purposes of this report.]

No. 13.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.

Mr. Justice Kensington.

CROWN—APPELLANT,

Versus

DOST MUHAMMAD—(ACCUSED)—
RESPONDENT.

Miscellaneous Criminal Case No. 84 of 1900.

Deaf and dumb persons charged with murder—Criminal Procedure Code, Section 341.

Held, following 37 P. R. 1889 Cr. (1) that an accused person charged with the offence of murder, who cannot, by reason of his being deaf and dumb, be properly tried, should be dealt with as a lunatic and that the matter should be reported to the Local Government for orders under Section 471 Criminal Procedure Code.

(1) 37 P. R. 1889 Cr. (*Empress v. Gahna*).

Case reported by E. A. Estcourt, Esquire, Sessions Judge of the Attock Division, under Section 341 of the Criminal Procedure Code.

The judgment of the Court was delivered by—

KENSINGTON, J.—Dost Muhammad, Pathan, aged 24, 22nd March 1911, has now been tried in the Sessions Court and convicted of the offence of murder. Sentence has not been passed. The learned Sessions Judge has expressed an opinion that, in view of the man's infirmity, he should not be sentenced to death. The record has accordingly been forwarded to the Chief Court for orders under Section 341, Criminal Procedure Code. We must take it that Dost Muhammad was, by reason of being deaf and dumb, unable to understand the proceedings of the trial.

The evidence on record is, in our opinion, conclusive that Dost Muhammad committed murder. We do not think that any immediate connection can be traced between the murder and the circumstance that the man was betrothed to the step-daughter of the deceased. All that can be said is that the crime was committed in a sudden fit of uncontrollable rage without any adequate explanation of the outbreak. From the evidence of Sher Ali, witness No. 8, uncle of Dost Muhammad, it would seem that Dost Muhammad is liable to sudden outbursts of passion. He is said to have broken the arm of a man on one occasion, and on another he was apparently believed to have caused the death of Sher Ali's first wife. At the same time it is stated that though the man is quarrelsome, he is not a lunatic.

It has always been a matter of some difficulty for High Courts to determine what action should be taken under Section 341, Criminal Procedure Code, where an offence is committed by a deaf mute. In the case of a minor offence described in *Dwarka Nath Hallar v. Noder Chand Kamte*⁽¹⁾ the Calcutta High Court directed that the prisoner be discharged, and a similar course was taken by this Court in the case reported as 34 P. R. 1885 Cr. ⁽²⁾ Where a more serious offence was committed, the High Court of Calcutta ordered a sentence of imprisonment for one year in the case *Crown v. Bowka* ⁽³⁾. So far as is known there have been only two cases of the kind in which murder was committed. In one of these, *Queen-Empress v. Somir Bowia* ⁽⁴⁾, the accused had been previously insane, and though he had been discharged from the lunatic asylum, the High Court, holding that he was not responsible for his action and that he was by reason of un-

⁽¹⁾ (1892) 22 W. R. 35 Cr.

⁽²⁾ 34 P. R. 1885 Cr. (*Atu Ram v. Empress*).

⁽³⁾ (1892) 22 W. R. 35 and 72 Cr.

⁽⁴⁾ (1900) I. L. R. 27 Cal. 388.

soundness of mind incapable of knowing that he was doing what was wrong and contrary to law, directed that he should be kept in jail until receipt of orders from the Local Government. The remaining case which is more directly in point is that reported as 37 P. R. 1889 Cr. (1). The Chief Court referred to an English decision in a case of murder and found that in England accused persons who are not insane, but labour under defects which render their trial impossible, have been treated as insane persons and confined during the Queen's pleasure. It was held that a similar course should be taken in respect of the prisoner Gohna then concerned, and Government was requested to deal with the case as if it had been reported under Section 471, Criminal Procedure Code.

We direct that this precedent be now followed. The case will be reported to the Local Government with reference to Section 471 Criminal Procedure Code, and pending the orders of Government, Dost Muhammad will remain in custody as if he had been sentenced to imprisonment.

— — —
No. 14.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon.
Mr. Justice Rattigan.*

KUTAB ALI AND 5 OTHERS—(CONVICTS)—
APPELLANTS,

Versus

CROWN—RESPONDENT.

Criminal Appeal No. 470 of 1910.

Murder—where no vital part is injured—confession to zaildar in consequence of inducement and confession to zaildar in presence of police—admissibility of—Indian Evidence Act, Sections 24-25.

Held, that a man who has either hacked a fellow-creature about in a most merciless fashion or has practically pounded him to death, cannot escape conviction of murder merely by urging that he was careful to avoid injuring a vital part.

Held also, that a promise held out by a zaildar is a promise "made by a person in authority" within the meaning of Section 24 of the Indian Evidence Act, and that a confession made to a zaildar in consequence of such promise is inadmissible in evidence.

Held further, that a confession made to a zaildar in the presence of the police and after arrival of the Thanedar, who at the time of the confession was sitting only a few yards off, was in reality a confession made to the police within the terms of Section 25 of the Indian Evidence Act and consequently inadmissible in evidence.

*Appeal from the order of Captain J. Frizelle, Sessions Judge,
Multan Division, dated the 11th July 1910.*

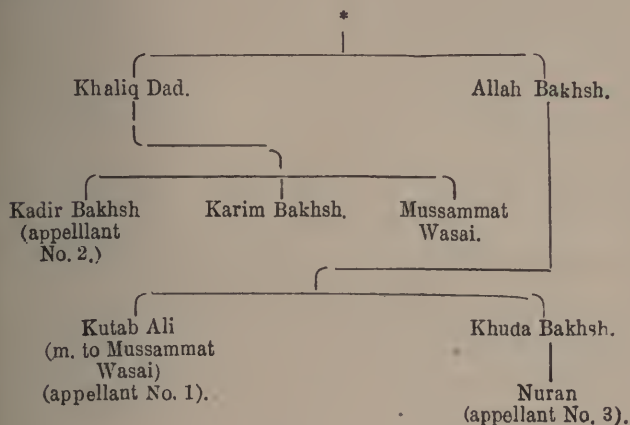
Mohammad Shafi, for appellants.

M. C. Mukerji, for respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—There are two sets of appellants in this appeal, 15th Feby. 1911.

Kutab Ali, Kadir Bakhsh and Nuran (appellants No. 1, 2 and 3) are members of the proprietary body of *mauza* Dera Wadhu in the Muzaffargarh District, whereas the appellants, Sahara, Haider and Bahara are *Baloch* menials who live in Tibi Nonari, which is about three-fourths of a mile distant from the houses of the first three appellants. The latter are Malana Jats and the following pedigree table will show their relationship *inter se* :—



Appellants Nos. 4, 5, and 6 are, of course, no relations of appellants Nos. 1, 2 and 3, but their relationship *inter se* is that of brothers, all three being sons of one Hassan.

According to the prosecution evidence, Karim Bakhsh, Malana, had a young servant named Kiman (aged about 25), a *Baloch*, to whom he appears to have been much attached. It is alleged that this young man became unduly intimate with Mussammat Wasai, the young wife of Kutab Ali, and also with Mussammat Kariman, the wife of Bahara, *Baloch*; that Kutab Ali and Kadir Bakhsh remonstrated with Karim Bakhsh and urged him to dismiss the said servant, that Karim Bakhsh was reluctant to do so; that they therefore requested Kiman's brothers (Nuran P. W. 3, and Miran P. W. 5) to represent the seriousness of the situation to Karim Bakhsh, and that when they found that there was no likelihood of Kiman's dismissal, they, in concert with Bahara (who had a similar

grievance against Kiman), Sahara and Haider, decided to take the law into their own hands and murder Kiman. As a result of this conspiracy Kiman was actually murdered (according to the prosecution) on the night of the 27th October 1909 by the six appellants, as he was lying asleep on a *charpai* outside Karim Bakhsh's hut.

The six appellants were accordingly tried in the Court of Sessions, Rawalpindi, on the charge of having committed an offence punishable under Section 302, Indian Penal Code, and they have been convicted by the Sessions Judge agreeing with the assessors of this offence. The learned Judge did not, however, feel called upon to inflict the capital sentence upon any of the appellants, partly (it would seem) because they are all comparatively young men (Kutab Ali, Nuran and Sahara being described by him as "mere boys") and partly because they were smarting under a wrong done to their respective families by the deceased, Kiman.

He has accordingly sentenced Kadir Bakhsh, Kutab Ali, Haider, Sahara and Bahara to transportation for life, and Nuran (who is said to have taken a minor part in the murder and to have been more or less an unwilling participator in it) to fourteen years' transportation. After delivery of judgment, the learned Sessions Judge discovered that he had made a mistake in Nuran's case, and that as the latter had been convicted of an offence punishable under Section 302, Indian Penal Code, no sentence short of transportation for life could be awarded. A note recording this mistake has been appended to his judgment by the Sessions Judge. Notice was accordingly issued by this Court to Nuran to show cause why his sentence should not be enhanced to transportation for life. Mr. Muhammad Shafi who appeared for all the appellants conceded that, if the conviction of Nuran is to be upheld, the sentence must necessarily be enhanced to transportation for life. The learned Counsel has, however, argued at length in support of his contention that there is no evidence upon the record sufficient to justify the conviction of any of the appellants upon the charge of murder, or upon any other charge.

Mr. Shafi's first argument is that, even if it is proved that the appellants caused the injuries to which Kiman succumbed, their intentions were merely to disfigure the man who had seduced the wives of Kutab Ali and Bahara, and that in inflicting the wounds upon the face of the deceased the appellants did not intend to cause the latter's death or to cause such injuries as they knew to be likely to cause his death.

In so arguing, Mr. Shafi of course did not admit that any part of the prosecution story in general or that part of it in particular which relates to the alleged intrigues, was true. His contention was that even upon the assumption that the prosecution evidence was in the main true, his clients had, at most, committed an offence punishable under section 326, Indian Penal Code, and that in view of the provocation which, upon the prosecution theory, the two families had received, a comparatively light sentence in each case would meet the ends of justice.

We are unable to accept this argument. From the medical evidence it is clear that no less than eight distinct incised wounds were found on the face of the deceased and that these injuries were probably caused by a sharp cutting instrument like a "small hatchet." Cases, no doubt, occur when an injured husband or other relative takes the law into his own hand, and decides to disfigure a man who has seduced his wife or other female relative, but does not intend to cause the latter's death. A not unusual form of such revenge is for the aggrieved party to cut off the nose or ears of the seducer. In the present case, however, we are of opinion that the person or persons who attacked and wounded Kiman, as he was lying asleep, must be taken to have intended to cause his death or to cause such bodily injuries as he or they knew to be likely to cause his death. The infliction of no less than eight severe wounds on the face of the deceased with a hatchet is, in our opinion, a clear indication that something more serious than mere disfigurement was intended. There is a conflict of medical evidence as to whether or not the injuries would in the ordinary course have resulted in death. Lala Chandu Lal, the Assistant Surgeon who performed the *post mortem* operation, was of opinion that the injuries if inflicted on a healthy subject might ultimately have caused death, but not immediately, and that the deceased, had he not been in a diseased state of body, might with proper medical care have recovered. On the other hand, Lieutenant Baillie, Civil Surgeon of Muzaffargarh, and Dr. Inayat Ullah Nasir Civil Surgeon, after reading the *post mortem* report and Lala Chandu Lal's evidence, were of opinion that the injuries as therein described were sufficient to cause death whether the subject was or was not in a healthy state. It is not for us to decide whether Lala Chandu Lal on the one hand, or Lieutenant Baillie and Dr. Inayat Ullah Nasir, on the other, is or are correct upon this point. But we have no hesitation in holding that the nature of the wounds and their number are such that it is a fair presumption that the person or persons who inflicted

them intended to cause the death of Kiman or to cause him such injuries as he or they knew would be likely to cause death. We cannot subscribe to the contention that a man is not to be convicted of murder simply and solely because he is clever enough to avoid injuring a vital part of the body.

We think the nature of the offence must be judged in each case upon its own facts, but that a man who has either hacked a fellow-creature about in a most merciless fashion or has practically pounded him to death, cannot escape conviction of murder if in consequence of such injuries his victim succumbs, merely by urging that he was careful to avoid injuring a vital part of the latter's body. In the case before us, we have no doubt that the wounds inflicted on Kiman were intended to cause his death or such injuries as were known by the offender or offenders to be likely to cause his death. In point of fact, they did actually result in death and that too within a few hours.

* * * *

(2) The Sessions Judge, and the assessors were of opinion that the confessions made on the 28th October by Kutab Ali, Nuran and Sahara to the Zaildar and Lambardar were "genuine and were made under no threat, promise, inducement or compulsion," and that the confessions were, therefore, admissible in evidence against all the appellants. We are unable to agree. In our opinion these confessions should never have been admitted in evidence as they were clearly made either in consequence of promises held out to the appellants or in circumstances which rendered the confession inadmissible as legal evidence. Before dealing with this objection to the confessions, however, we might at the very outset draw attention to the fact (and we regard it as somewhat significant) that of the appellants those who made confessions to the Zaildar and Lambardar, and on the next day to the Magistrate, were the three appellants who described by the Sessions Judge as "more boys," namely, Kutab Ali, Nuran and Sahara. Haider is said to have made a sort of confession to two persons and with this we shall deal hereafter, but neither Haider nor Sahara or Qadir Bakhsh made any confession before a Magistrate.

We start then with the admitted fact that the first persons to confess were the three boys, and it is obvious that it would not be difficult to work upon the feelings of such youths. As a matter of fact, we find that Kutab Ali and Nuran at first denied all knowledge of the matter, but that subsequently, first, Kutab Ali and then Nuran admitted that they

had taken part in a murder. Ahmad Ali, Zaildar, states that he told Kutab Ali, after the latter had denied all knowledge of the affair, that he *must* know something about the murder and that the best thing he could do would be to tell the whole story. The Lambardar, Mehr Ali, however, admits that the Zaildar told Kutab Ali, *that he would get off if he confessed*. Nuran's confession to the Zaildar and the Lambardar was made at the same time, and we have no doubt, under the same inducement, though no definite evidence as to this is apparent on the record. But admittedly both these boys were before the two officials at the same time and we see no reason to doubt that the inducement offered to the one was equally offered to the other. Now, it is well known to everybody in a village that the Zaildar is an official whose duty it is to help the police in the investigation of offences and a promise held out by a Zaildar in such circumstances is, in our opinion, a promise made by a person in authority within the meaning of section 24 of the Indian Evidence Act. We hold, therefore, that the confessions of Kutab Ali and Nuran to the Zaildar and Lambardar were inadmissible in evidence by virtue of the provisions of that section.

The confession made by Sahara to those officials on the same day is also inadmissible in evidence. The Zaildar frankly admits that this youth's confession was made in the presence of the police and after the arrival of the Thanadar who, at the time of the confession, was sitting only a few yards off. Mehr Ali, Lambardar, gives evidence to the like effect. It is true that technically this confession was not made to the police, but we cannot lose sight of the fact that in reality it was so made. The police were actually present and must have heard everything that was said, and to admit that a confession, nominally made to a third party, does not come within the spirit or letter of Section 25 of the Indian Evidence Act because, though the police were present, the confession was addressed to a third person would, in our opinion, be tantamount to holding that the police could by this convenient subterfuge evade the stringent provisions of that section. We hold, therefore, that Sahara's confession to the Zaildar and the Lambardar, made in the immediate presence of the police, was also inadmissible in evidence.

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(3) We have next the confession said to have been made by the appellant, Haider, to Ilahi Bakhsh (P. W. 10) and M. Ghulam Ali (P. W. 13) on the 31st October 1909. We regret

that we are unable to accept this evidence as beyond reproach. M. Ghulam Ali, Zaildar, was most zealous in investigating this matter and was laudably desirous of discovering the criminals. He and Ilahi Bakbsh were requested by the Sub-Inspector to question Haider upon the subject, and it is said that the two witnesses took the latter away to some distance from the police and that thereupon Haider at once disclosed all he knew. He is said to have made this confession freely and without the least hesitation, and yet when asked to walk back a few paces and repeat his confession to the police, he flatly declined to do so. He also refused to make any confession before a Magistrate and he has strenuously denied throughout the proceedings that he made any admissions to the two witnesses above-mentioned. We are by no means satisfied, in these circumstances, that he made the alleged confession, but even if he did, it was obviously made at a time when he was regarded as a suspect and the police, if not actually present, were only a little distance off. In our opinion, this so-called piece of evidence is absolutely worthless. The value that the police themselves attached to the so-called confession may be gauged by the fact that Haider was not then and there arrested. Ghulam Ali had informed the police of the confession on the 31st October at 9 A. M. and it was not till the evening of the next day (the 1st November) that Haider was formally arrested and then only (so it would seem) in consequence of statements made by Mehr Shah and Haider Shah.

(4) There remain, therefore only the confessions made by Kutab Ali, Nuran and Sahara to the Magistrate, 1st class, on the 29th October. These confessions it must be remembered, were made by persons described as mere boys, and two of them had been induced, by promises of pardon, to make confessions the previous day to the Zaildar and the Lambardar, while the third had made a confession in the immediate presence of the Sub-Inspector that same day. It is hardly too much to say, therefore, that it was quite possible that these youths were still under the impression that their best policy would be to please the police and the officials and thus secure their pardon. One of them, Nuran, apparently had reconsidered his position, for his so-called confession to the Magistrate is, in reality, no confession at all, as he asserted that he was compelled by force to take part in the crime and that he had done his best to give information before hand to the relatives of the deceased of the conspiracy to murder the latter. In this he is borne out by Sahara who also stated that Nuran was not a free agent

in the matter. The result, then, is that the whole of the prosecution evidence against the six appellants narrows itself down to the confessions of Kutab Ali and Sahara, made before M. Sarwar Khan, Magistrate, 1st class. These confessions were, as we have already observed, made by two young boys who had been either cajoled or frightened into making extra-judicial confessions the day before, and they were promptly retracted when the two youths appeared before the committing Magistrate. We cannot regard such confessions as sufficient to establish a case against these two appellants themselves, and they certainly are not sufficient to prove the guilt of the other appellants.

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[The remainder of the judgment is not required for the purpose of this report].

No. 15.

*Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice
Shah Din.*

KANHAYA AND OTHERS—(CONVICTS)—
APPELLANTS,

Versus

CROWN—RESPONDENT.

Criminal Appeal No. 776 of 1910.

Confession by co-accused who has pleaded guilty, when irrelevant as against the other accused—Indian Evidence Act Section 30 and Criminal Procedure Code, Section 271.

Held that when the court accepts a plea of guilty by one of several accused persons, though not in express terms nor at the moment it was put in, a confession made by such person cannot be taken into consideration against the other accused persons.

Subrahmaniam Ayyar v. King-Emperor ⁽¹⁾, *Queen-Empress v. Pahuji* ⁽²⁾, *Queen-Empress v. Chinna Paruchi* ⁽³⁾ and 11 P. R. 1900 Cr. ⁽⁴⁾ followed.

Appeal from the order of Khan Bahadur Pirzada Molvi Mohammad Hussain, Sessions Judge, Hissar, dated the 10th November 1910.

Gullu Ram for Appellants.

Government Advocate for Respondent.

⁽¹⁾ (1902) I. L. R. 25 Mad. 61 (69) P. C.

⁽²⁾ (1895) I. L. R. 19 Bom. 175.

⁽³⁾ (1900) I. L. R. 23 Mad. 151.

⁽⁴⁾ 11 P. R. 1900 Cr. (*Piara Singh v. Queen-Empress*).

The judgment of the Court was delivered by—

28th Feby. 1911.

JOHNSTONE, J.—In this case the following convictions and sentences have been obtained by the prosecution :—

Against Bhola, under Section 397, Indian Penal Code, transportation for life ;

Against Kanhaya (previous convict), under Section 397-75, Indian Penal Code, transportation for life ;

Against Bawa Narain Das, under Section 397, Indian Penal Code, seven years' rigorous imprisonment ;

Against Sarjit, Chuttan, Bochan, Sulhar, Mangtu and Shib Lal, under Section 395, Indian Penal Code, 5 years' rigorous imprisonment (3 months' solitary) ;

Against Bhartu, Section 395-109, Indian Penal Code, 3 years' rigorous imprisonment (3 months' solitary).

Accused Pirthi, Chetu, Piru and Surja were acquitted on the ground that the identification of them by the prosecution witnesses was of doubtful value.

The case for the prosecution was that on the night of 6th-7th July last a dacoity involving house breaking and theft and the causing of hurt was committed in the village of Gopalpur in the Sampla *thana* of Rohtak District, and that the 14 accused persons with Sumera, the approver, and one or two more, were the culprits. Against their convictions Bhola and Sulhar have appealed through jail (Nos. 30 and 31 of 1911), while Kanhaya, Mangtu, Shib Lal and Bhartu have appealed through a pleader (No. 776 of 1910), Bhartu also putting in a supplementary appeal through Mr. Gullu Ram, advocate.

All these appeals can conveniently be disposed of in one judgment. Narain Das, Sarjit, Chuttan and Bochan have not appealed.

There is no doubt whatever about the *factum* of the dacoity. As we shall see, a gang of malefactors certainly did appear at Gopalpur on the night in question, and there can be no doubt that that gang stole property and caused hurt. The real question for consideration is the identity of the dacoits ; that is to say, did each and every one of the appellants join in this crime ?

The first question argued before us was, whether the confession of Bawa Narain Das accused, which was adhered to throughout, could be taken into consideration against the co-accused. It is contended that it cannot, because the Bawa plea-

ded guilty and so was not *tried* along with the other accused, and in support of the contention we are referred to Section 30, Indian Evidence Act, to *Subrahmania Ayyar v. King-Emperor* ⁽¹⁾, *Queen-Empress v. Pahuji* ⁽²⁾, *Queen-Empress v. Chinna Paruchi* ⁽³⁾ and 11 P. R. 1900 Cr. ⁽⁴⁾. These rulings are quite clear and explicit. Mr. Petman, Government Advocate, argues that the *dictum* contained in these rulings, which he admits to be a correct *dictum*, applies only when the plea of guilty has been "accepted," and points to the words "*may be convicted*" in Section 271, Criminal Procedure Code, as showing that such a plea need not be accepted by the Court. In our opinion, however, the plea was accepted in this case, though not in express terms at the moment it was put in. The test is whether the judgment of the Lower Court discussed the guilt of the Bawa as an open question to be decided by the evidence on the record, and we can find nothing of this sort. The only passages in the judgment which need even a passing comment in this connection are:—

P. 14—"He (the Bawa) was brought on the 21st to Rohtak along with a flask full of black and grey gunpowder, which was found in his possession at the time of his arrest."

P. 16—"The Bawa himself was identified there by witnesses from Gopalpur."

P.P. 18 and 11—The discussion of the value of the confession.

We think the first passage was merely written as part of the history of the case, as also was the second, and not as implying that apart from them, the Court would have entertained doubts as to the truth of the plea of guilty.]

As to the third passage our opinion is that the value of the confession in its details had to be tested and discussed, because the Court below was (wrongly) using it under Section 30 *aforeaid* against the other accused. We therefore rule that the confession of the Bawa is inadmissible as against the appellants.

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[The remainder of the judgment is not required for the purpose of this report].

(1) (1902) I. L. R. 25 Mad. 61 (69) P. O.

(2) (1895) I. L. R. 19 Bom. 195.

(3) (1900) I. L. R. 23 Mad. 151.

(4) 11 P. R. 1900 Cr. (*Piara Singh v Queen-Empress.*)

No. 16.

Before Hon. Mr. Justice Kensington and
Hon. Mr. Justice Johnstone.

HARNAM SINGH—(ACCUSED)—PETITIONER,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 183 of 1911.

First offender—Criminal Procedure Code, Act V of 1898, Section 562—applicability of, to offence of cheating punishable under Section 420, Indian Penal Code.

Held, that the word "cheating" as used in Section 562 of the Criminal Procedure Code, refers only to the form of cheating punishable under Section 417 of the Indian Penal Code and not to the more serious offence punishable under Section 420 with seven years imprisonment.

Petition under Section 439 of the Criminal Procedure Code for revision of the order of Major B. O. Roe, Sessions Judge, Amritsar Division, dated the 25th January 1911.

Gobind Das for petitioner.

The judgment of the Court was delivered by—

17th April 1911.

JOHNSTONE, J.—In this case the accused Harnam Singh was tried and charged by a 1st class Magistrate of Amritsar under Section 420, Indian Penal Code, at the instance of one Fazl Din. The learned Magistrate found him guilty and convicted him, but passing no sentence, dealt with him under Section 562, Criminal Procedure Code. The accused applied to the Sessions Judge on the revision side, whereupon that authority passed the following order :—

"No appeal was preferred and after considering the matter I referred the case to the Chief Court as the order of the Magistrate was illegal. Had an appeal been preferred, I should certainly have ordered a re-trial. And there are certainly no grounds for entertaining this application for revision."

As a matter of fact Harnam Singh had been found guilty in two separate cases, the facts being *mutatis mutandis* the same, at the instance of Fazl Din and Chiragh Din, respectively, and the references to this Court will be found in Criminal Revisions 1691 of 1910 and 89 of 1911. All three cases can be conveniently disposed of in one judgment.

Section 562, Criminal Procedure Code, as has more than once been pointed out, is not very happily worded. In it we find indications both ways as to the meaning to be assigned to the word "cheating"; but to us it seems that the Legislature

intended that the word should cover only the form of cheating punishable under section 417, Indian Penal Code, with one year's imprisonment, and not the more serious form punishable under section 420 with seven years. We need not discuss the matter at length; it is enough to say that we follow *Crown v. Neki Ram* ⁽¹⁾, *Emperor v. Ngu Pyi* ⁽²⁾ and *Emperor v. Bapu Rao Maratha* ⁽³⁾. It is undeniable that there is some difficulty in seeing the real distinction between the offences mentioned in section 417 and section 420, Indian Penal Code, respectively, but we are not here concerned with this distinction or this difficulty. We hold, then, that section 562, Criminal Procedure Code, cannot be used upon a conviction under section 420, Indian Penal Code.

The question for us is what is the proper course for this Court now to pursue. Mr. Govind Das, for the convict Harnam Singh, urges that we should order a retrial; but in our opinion we should follow the line taken by the Court in *Emperor v. Bapu Rao Maratha* ⁽³⁾ already quoted, set aside the orders under section 562, Criminal Procedure Code, and remand the cases to the Magistrate to pass lawful sentences. Accused might himself have appealed in the first instance, see 24 *P. R.*, 1904 (Criminal) ⁽⁴⁾; but he went up on the revision side instead. The learned Sessions Judge should have instructed him to *appeal*, or should have sent the cases up here on revision side with a recommendation that the order under section 562, Criminal Procedure Code, should be set aside and the case be remanded, not for retrial, but for the passing of a legal sentence. That this is the proper course for us now is clear from a perusal of section 439, Criminal Procedure Code read with Section 423, clause (d), as explained in *Narayan Swami v. Emperor* ⁽⁵⁾ and *Emperor v. Birch* ⁽⁶⁾. Mr. Govind Das is right in contending that we cannot ourselves pass sentence now, but he is hardly correct in his further contention that we can only order retrial; clause (d) aforesaid is very wide and fully empowers us to do what we are about to do.

We therefore set aside both the orders under section 562, Criminal Procedure Code, and remand the case to the first Court in order that it may pass legal sentences. If the sentences passed are appealable, Harnam Singh can, of course, appeal; if not he can apply for revision on the merits.

⁽¹⁾ 23 *P. W. R.*, 1908, *Cr.*

⁽²⁾ (1906) 3 *Cr. L. J. R.*, 21.

⁽³⁾ (1908) 7 *Cr. L. J. R.*, 319.

⁽⁴⁾ 24 *P. R.*, 1904 *Cr.* (*King-Emperor v. Manohar Das*).

⁽⁵⁾ (1906) 1 *L. R.*, 29 *Mad.* 567.

⁽⁶⁾ (1902) 1 *L. R.*, 24 *All.*, 306.

No. 17.

*Before Hon. Sir Arthur. Reid, Kt., Chief Judge and Hon.
Mr. Justice Kensington.*

GHAZI—(CONVICT)—APPELLANT,

Versus

CROWN--RESPONDENT.

Criminal Appeal No. 148 of 1911.

Dying declaration—recorded by Magistrate—proof of—Indian Evidence Act, section 32.

Held that a dying declaration recorded by a Magistrate cannot be accepted in evidence without proof.

Appeal from the order of O. L. Dundas, Esquire, Sessions Judge, Rawalpindi Division, dated the 16th February 1911.

Abdul Kadir, for appellant.

Mul Chand, for respondent.

The judgment of the Court was delivered by—

31st March 1911.

KENSINGTON J.—

* * *

There are upon the record two statements by the deceased Mardana purporting to be dying declarations. The first of these was recorded by the Sub-Inspector of Police after arrival in the village on the night of the murder. This is proved both by the Sub-Inspector himself (witness 14) and by Fateh Khan (witness 9) described as *ilagadar*. It supports the prosecution evidence both as to the circumstances of the murder and as to the motive and makes it clear that Mardana was lying asleep when he was first attacked. The second statement was recorded in hospital by a Magistrate the next morning. It has not been proved by taking the statement of the Magistrate, and we must hold that the Sessions Judge should not have accepted it in evidence without such proof. His explanation that the Magistrate who recorded the statement was also the committing Magistrate in the case is not unreasonable in itself, but is legally insufficient. Dying declarations are not covered by the provisions of Chapter XLI of the Criminal Procedure Code, dealing with special rules of evidence in certain cases, and there is nothing in section 32 of the Evidence Act to justify a Court in going beyond the ordinary rule that every statement placed on the record must be properly proved. We desire to make this clear as an omission of the kind might in other cases cause serious trouble, but in the present case the second dying declaration adds

nothing to the first, and its inadmissibility in evidence without further proof is for practical purposes immaterial.

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Appeal rejected.

No. 18.

Before Hon. Mr. Justice Kensington, Offg. Chief Judge.

THE CROWN—PETITIONER,

Versus

SOHAN SINGH—(CONVICT)—RESPONDENT.

Criminal Revision No. 1101 of 1911.

Punjab Laws Act, IV of 1872, section 47—penalty.

Held, that no rules having been framed by the Local Government under sections 47 or 50 B. of the Punjab Laws Act, attaching a penalty to a breach of the provisions of section 47, the latter is not a punishable offence.

Case reported by S. Wilberforce, Esquire, Sessions Judge, Lahore Division, with his No. 944 of 16th August 1911.

Obedullah, for Crown.

Nemo, for accused.

The facts of this case are as follows :—

A buoy (6½ feet long and 2½ feet wide at the broad end) with 6 dried water-melons, with the inside emptied out, were found out from the possession of the accused who had no licence.

The accused, on conviction by Sardar Sohan Singh exercising the powers of a Magistrate of the first class in the Lahore District was sentenced by order, dated 21st July 1911 under section 47, Act IV of 1872, to undergo one month's rigorous imprisonment.

The proceedings are forwarded for revision on the following grounds :—

Accused was sentenced to one month's rigorous imprisonment for having in his possession dried water-melons, with the insides emptied out, for use as buoys to cross the Ravi. He was sentenced under section 47 of the Punjab Laws Act. I forward the case for revision, as no sentence is provided by law for a breach of section 47. No rules have been framed under section 50 B nor were there any pre-existing rules.

The sentence appears clearly illegal, I recommend that it be quashed.

The order of the learned Judge was as follows :—

4th October 1911. KENSINGTON, J.—For reasons given by the learned Sessions Judge the conviction is set aside. Soban Singh must be acquitted as having committed no offence known to law. He is discharged from his bail.

This is not the first case of the kind which has come before me from the Lahore District. The District Magistrate should take measures to see that men are not prosecuted for supposed offences under section 47 of the Punjab Laws Act, there being no rules under either section 47 or section 50 B constituting it an offence, in this part of the Punjab to manufacture rafts or buoys, or to use them for crossing rivers.

Revision accepted.

No. 19.

Before Hon. Mr. Justice Rattigan.

CROWN—PETITIONER,

Versus

DILSUKH—(ACCUSED)—RESPONDENT.

Criminal Revision No. 1319 of 1911.

Criminal Procedure Code, section 488, order for maintenance—restricted to money payments.

Held, that an order under section 488, Criminal Procedure Code, for maintenance must be of money payable as a monthly allowance, and that the section does not warrant an order that the allowance be paid wholly or partly in grain or the like.

Case reported by M. V. Bhide, Esquire, District Magistrate, Hissar, with his No. 2159, dated 23rd September 1911.

Application under section 488 of the Criminal Procedure Code, for maintenance.

The facts of this case are as follows :—

Mussammat Kesar, wife of Dilsukh, applied under section 488, Criminal Procedure Code, for maintenance being granted to her. The case was decided by Lala Murari Lal, Magistrate, 1st class, Hissar, who passed the following order on 30th August 1911.

“ Mulzam muddaya ko ek man fe moh anaj ab aur fasel “ bari ke bad derh man fe mah diya kare, aur adam adaygi men “ char rupaye mah-war baraye guzara mustaghisa ka muqarrar “ kiya jata hai.” (Translation—Accused to give to complainant one maund of grain *per mensem* and from the next harvest 1½ maunds of grain. In default, four rupees *per mensem* are fixed as maintenance to be paid per month (by accused).

The proceedings are forwarded for revision on the following grounds :—

The Criminal Procedure Code seems to sanction only a monthly allowance in cash to the extent of Rs. 50 *per mensem* and the order as regard payment of $\frac{1}{3}$ grain seems to be illegal (see instructions to judicial officers issued by the Chief Court, paragraph 13—15, page 217—8, edition of 1901).

The order of the Chief Court was delivered by—

RATTIGAN, J.—No one present—An order under section 488, Criminal Procedure Code, for maintenance must be for a sum of money payable as a monthly allowance, at a rate not exceeding Rs. 50 a month, and the section does not warrant an order that the allowance be paid wholly or partly in grain or the like. I accordingly alter the order of the Magistrate and direct that Dilsukh pay Mussammatt Kesar the sum of Rs. 4 a month as maintenance from the date of the Magistrate's order (*viz.*, the 30th August 1911).

11th Nov. 1911.

Revision accepted.

No. 20.

*Before Hon. Mr. Justice Kensington, Offg. Chief Judge, and
Hon. Mr. Justice Shah Din.*

CROWN—APPELLANT,

Versus

RAHM ALI AND JALAL DIN—RESPONDENTS.

Criminal Appeal No. 366 of 1911.

Penal Code—section 225 B—rescuing a deserter from the Army from Police custody—Criminal Procedure Code, section 54 (1) sixthly.

Held, that a Police officer is empowered under section 54 (1) *sixthly* to arrest without a warrant a person reasonably suspected of being a deserter from His Majesty's Army, and therefore persons who intentionally offer any resistance or illegal obstruction to his apprehension or rescue or attempt to rescue him from such custody are guilty of an offence under section 225 B, Indian Penal Code, as amended by Act X of 1886.

*Appeal from the order of Lala Har Sukh Rai, Magistrate, 1st Class,
Jhelum, dated the 31st March 1911.*

Government Advocate, for appellant.

Jalal-ud-Din, for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—This is an appeal by the Local Government under section 417, Criminal Procedure Code, from an original 13th Sept. 1911.

order of acquittal passed by Lala Har Sukh Rai, Magistrate, 1st Class, Jhelum.

The respondents Rahm Ali, age about 25, and Jalal Din, age about 70, were charged under section 225, Indian Penal Code, with having rescued one Zain-ul-Abidin, son of Jalal Din, respondent No. 2, a deserter from His Majesty's Army, from the lawful custody of Mirza, police constable, who had been deputed by the Sub-Inspector in charge of the Jhelum *Safr* Thana to arrest the said Zain-ul-Abidin. In support of the prosecution story evidence was given by Mirza, police constable, Karm, *chaukidar*, Nur Muhammad, peon and Nek Muhammad. Bugga, who was produced as a prosecution witness, did not support the statement of Mirza, and his evidence may well be left out of account. The Magistrate framed charges against the respondents in respect of an offence under section 225, Indian Penal Code, and they pleaded not guilty to the charge. In defence they produced evidence to the effect that Rahm Ali respondent No. 1, was absent from the village at the time when, Zain-ul-Abidin was alleged to have been rescued from the custody of Mirza, and that Jalal Din, respondent No. 2, was lying ill in his house and was too weak to have taken part in the alleged rescue of his son. The magistrate without discussing the evidence on the record and without recording a finding as to whether the version of the affair as given by the prosecution has or has not been established, has acquitted the respondents, on the ground that even if they rescued Zain-ul-Abidin from the custody of Mirza constable, as alleged by the prosecution, no offence under section 225, Indian Penal Code, has been committed by them. In the opinion of the Magistrate, Zain-ul-Abidin's desertion from the Army did not amount to an "offence" within the meaning of section 225, read with section 40, Indian Penal Code, and therefore his arrest by Mirza, constable, was not "for an offence" so as to bring the case of the respondents, who are alleged to have rescued Zain-ul-Abidin from the lawful custody of Mirza, within the purview of the said section 225. The Magistrate has, however, overlooked the provisions of section 225-B, Indian Penal Code, which was enacted by the Legislature to meet cases like the present, and which is applicable to a case not provided for in section 225, Indian Penal Code, or in any other law for the time being in force. If, as alleged by the prosecution, the respondents intentionally offered any resistance or illegal obstruction to the apprehension of Zain-ul-Abidin, or rescued or attempted to rescue him from the custody of Mirza, in which

he was lawfully detained, then clearly the respondents are guilty of an offence under section 225-B, Indian Penal Code, read with section 54 (1) (sixthly) of the Criminal Procedure Code, and they ought to be punished accordingly. The view of the law applicable to the case taken by the Magistrate is therefore obviously wrong; and the only question for consideration now is whether it is satisfactorily proved, as alleged by the prosecution, that the respondents rescued Zin-ul-Abidin from the custody of Mirza, constable, on the occasion in question.

* * * * *

[The remainder of the judgment is not required for the purpose of this report.]

No. 21.

Before Hon. Mr. Justice Rattigan.

CROWN (THROUGH MUNICIPAL COMMITTEE, SIMLA)—
PETITIONER,

Versus

BEJA RAM—(ACCUSED)—RESPONDENT.

Criminal Revision No. 1231 of 1911.

Simla Municipal Bye-law No. 18—construction of—Punjab Municipal Act, XX of 1891, section 143 (h) (ii).

Held, that the appointment of an agent by a non-resident house owner of Simla without notifying the appointment to the Engineer-Secretary of the Municipality is not a compliance with Bye-law 18 framed under section 143 (h) (ii) of the Punjab Municipal Act, 1891, and such house owner is liable to the penalties provided by clause (4) of the said Bye-law.

Case reported by A. B. Kettlewell, Esquire, District Magistrate, Simla, with his No. 1658 of 25th August 1911.

The facts of this case are as follows :—

The Magistrate has either discharged or acquitted the accused on the ground that he was not bound to notify the appointment of an agent to the Municipal Committee under the Bye-law referred to. The accused was prosecuted because he failed to appoint or notify the appointment of an agent to the Municipal Committee. The Magistrate has found that the accused did not notify the appointment of an agent, but has held that no offence has been committed, because the Bye-law (clause 2) does not preclude the appointment of an agent in some other manner than that laid down.

The proceedings are forwarded for revision on the following grounds :—

The Magistrate's interpretation of the Bye-law appears to be wrong. It is impossible, I think, to read clauses 1, 2 and 4 of the Bye-law together and to hold that a loophole has been left for the appointment of an agent in any other manner than that prescribed in clause 2. Had this been so, the word 'and' would not have been used between the words 'Bye-laws'.....' 2' in the penalty clause (4). The Municipal Committee has no desire to re-open or press the prosecution against the accused, but it is important that the correct interpretation of Bye-law No. XVIII should not be left in doubt. Clause 1 of the Bye-law provides for the appointment of an agent, clause 2 explains what such appointment means and clause 4 prescribes a penalty for a breach of the two clauses taken or read together. It may be argued no doubt that Bye-laws and their penal clauses must be interpreted strictly in cases, where doubt exists in favour of the accused, but such interpretation must, I think, be reasonable and in the present case the reading of the Bye-law seems to have been pushed to unreasonable limits. I refer the case for the orders of the Chief Court under section 433 of the Criminal Procedure Code for the reason I have noted above.

The judgment of the learned Judge was as follows :—

4th Nov. 1911.

RATTIGAN, J.—By Punjab Government Notification, No. 483, dated 20th August 1904 the following Bye-law, framed under section 143 (h) (ii), was declared to be in force within the limits of the Simla Municipality, namely :—

" (1) Every owner of any building or land situated
 " within the limits of the Municipality who does
 " not reside in the Municipality shall appoint
 " a person residing within or near the Municipality
 " to act as his agent for all the purposes of the
 " Punjab Municipal Act of 1891 or any rules or
 " Bye-laws thereunder.

" (2) An agent shall be held to be appointed when the
 " owner has duly notified the same in writing
 " attested by the person appointed, to the Engineer-
 " Secretary, Municipal Committee.

" N. B.—Such person shall be held to be the agent
 " until the contrary is notified by the owner or
 the agent.

“(3) A register shall be maintained in the Municipal Office in which the names of all agents so appointed together with the date of such appointment shall be entered.

“(4) Any breach of the preceding bye-laws 1 and 2 shall be punishable with fine, which may extend to Rs. 50, and when the breach is a continuing one with a further fine, which may extend to Rs. 5 for every day during which the breach continues.”

One Beja Ram, a resident of Patiala State and an owner of house property in Simla, was prosecuted by the Municipal Committee, Simla, for non-compliance with the aforesaid bye-laws. He pleaded that he had appointed one Salig Ram as his agent for all purposes of the Municipal Act, but it was proved that the appointment of Salig Ram had not been notified to the Engineer-Secretary, Municipal Committee.

The Magistrate thereupon passed the following order :—

“No offence has been committed. It is not proved that accused did not appoint an agent. He says he appointed Salig Ram. He did not notify the fact. This is not an offence under the bye-laws.”

The order is exceedingly curt and does not state whether the accused is discharged or acquitted. The District Magistrate has referred the matter for the consideration of this Court under section 438 of the Criminal Procedure Code and in so doing he points out that “the Municipal Committee have no desire to re-open or press the prosecution against the accused but it is important that the correct interpretation of bye-law No. XVIII should not be left in doubt.” I quite agree that in a case of this kind a Municipal Committee is justified in asking this Court, through the proper channel, to decide whether a particular interpretation placed upon its bye-laws by a Subordinate Court is correct, and this too in a case, in which it does not wish to press the prosecution of the particular individual concerned. I proceed, therefore, to give my opinion upon the point referred.

The Magistrate was evidently of opinion, that the mere fact that a non-resident owner had appointed an agent to act for him was sufficient compliance with the provisions of the bye-laws under consideration and that his omission to notify the appointment to the Engineer-Secretary, Municipal Committee, did not render him liable to the penalties provided by No. 4 of the said bye-laws. I cannot agree with this construction.

Obviously the main intention of the bye-laws was that in such cases there should be some person resident within the limits of the Municipality to whom, in the absence of the owner, the committee could look and who would be responsible to it for carrying out its orders. It has accordingly framed the bye-laws in question and as they have obtained the sanction of the Local Government and are *intra vires*, clause (ii) of section 143 (b) of the Act, they have the force of law.

The second bye-law provides that an agent *shall be held to be appointed* when the owner has "duly notified the same in writing, "attested by the person appointed, to the Engineer-Secretary, "Municipal Committee." The obvious meaning of this bye-law is that the appointment of an agent shall be complete only when it is notified to such officer and that no other "appointment" can be regarded as such for the purposes of the bye-laws. To hold that a secret appointment of an agent is a sufficient compliance with the terms of the bye-laws, would be tantamount to setting the bye-laws at naught, and would, moreover, ignore the plain wording of the second bye-law. An agent is to be held to be appointed only when his appointment is duly notified, and it follows logically that no agent can be held to be appointed unless and until his appointment is so notified.

I have no hesitation in holding that the interpretation placed upon the bye-laws by the Magistrate in this case was erroneous and that the accused person was guilty of the offence with which he was charged. But as this committee do not wish to take further action against him in these proceedings I refrain from interfering with the Magistrate's order.

Application allowed.

REVENUE JUDGMENTS.

NAMES OF REVENUE CASES REPORTED IN THIS VOLUME.

Name of Case.				Name of Financial Commissoner who decided the Case.	No.	Page.
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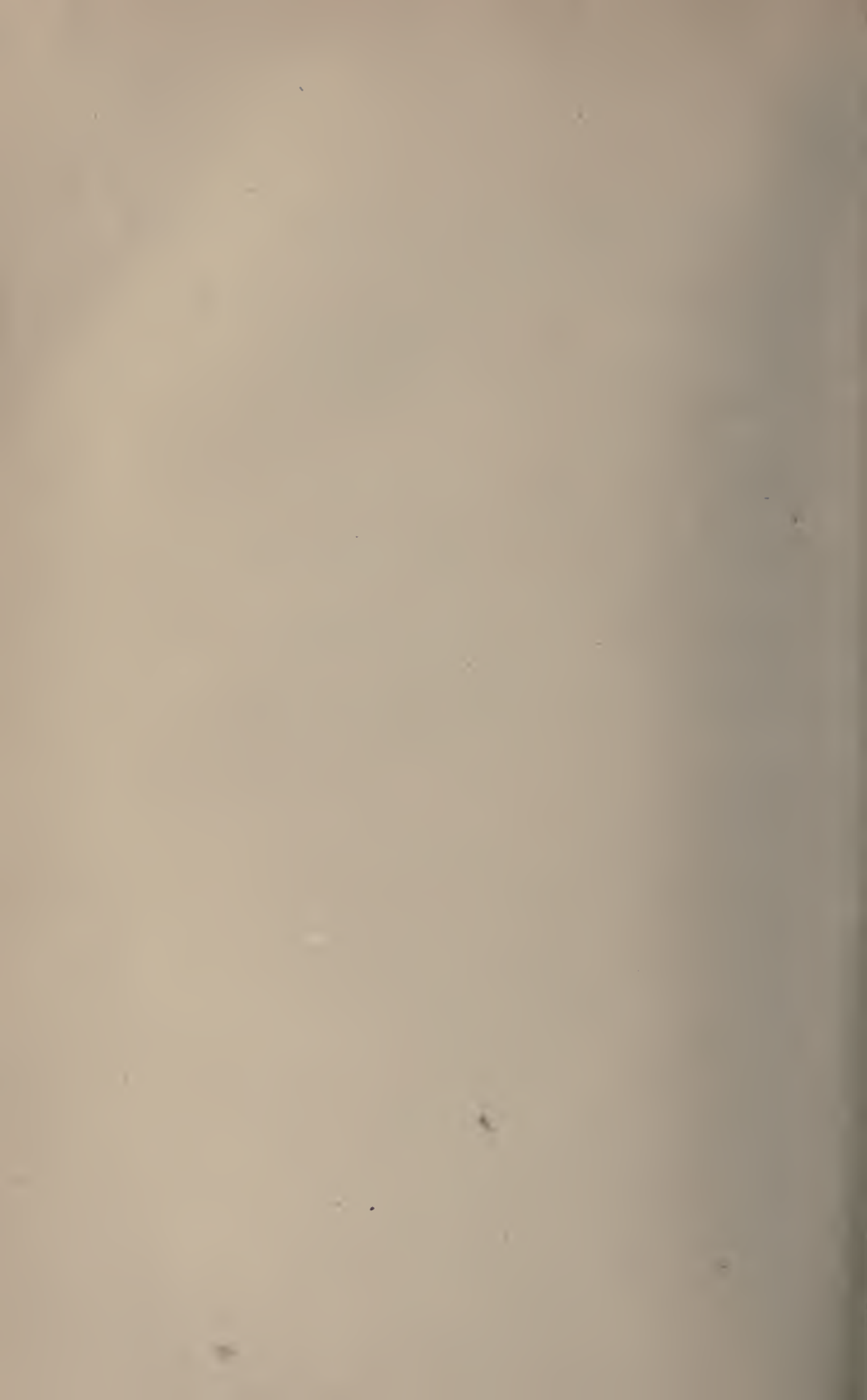


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A

ACTS.

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C

CUSTOM (SUCCESSION).

Custom (Succession)—heirless estate—village community—escheat to Crown—Hindu Law.—Held, that the following propositions are applicable to the subject of escheat to the Crown:—

1. The right of the Crown to claim escheat rests not on customary or Hindu Law, though Hindu Law recognises escheats, but on grounds of general or universal law.

2. The right can only arise in the absence of relations entitled by law or custom to inherit.

3. The right of the proprietary body as a whole to succeed in cases in which it exists, is primarily based on real or assumed relationship to the holder of the land or to the member of the proprietary body from whom his title was derived.

4. Such a right should be assumed in the case of homogeneous estates or sub-divisions of estates, where the owners are all or nearly all of the same tribe as the last holder of the land or the member of the proprietary body from whom he derived his title.

5. It should not be assumed in the case of heterogeneous estates or sub-divisions of estates held by persons of different tribes or different *gots* of the same tribe. The presumption in such cases is that the State has a right of escheat.

6. When the property in the land was originally derived by gift from a member of the tribe of the original proprietary body, the right of the body should be recognised on failure of the donor's and donee's lines.

7. In any case in which the *wajib-ul-arz* declares the right of the proprietary body to succeed to the land of heirless owners, Government should set up no claim.

The references are to the Nos. given to the cases in the "Record."

CUSTOM (SUCCESSION)—*concl'd.*

Held accordingly, that the heirless land concerned being situate in *patti* Mohra of *mauza* Kaliana, Thanesar *tahsil*, Karnal District, a village owned by an utterly heterogeneous proprietary body, where even the Jat proprietors are of different *gots* both in the village as a whole and in the *patti* concerned, and the land having been owned originally by a Jat of a *got* of which he was the only representative in the village and, having been held after his death by his wife's nephews belonging to a village in the Amballa district, that there was no possible claim of succession in the proprietary body of the village or the *patti* as a whole or in the Jat proprietors separately, and it must be held that the land escheats to the Crown and must be recorded as Government property.

... .. No. 2 P. R. (Rev.) 1911.

E

ESCHEAT—

To Crown.

See *Custom (Succession)*.

... .. No. 2 P. R. (Rev.) 1911.

H

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Recognises escheat.

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J

JURISDICTION OF CIVIL OR REVENUE COURT.

Occupancy tenancy alienated by tenant—Tenant suing proprietors for possession after latter have had alienation set aside—Suit cognisable by Civil Courts and not by Revenue Courts.

See *Occupancy Tenant*.

... .. No. 1 P. R. (Rev.) 1911.

O

OCCUPANCY TENANT—

Occupancy tenancy—alienated—Tenant suing proprietors for possession after latter have had alienation set aside—Jurisdiction of Civil or Revenue Court—Punjab Tenancy Act, XVI of 1887, sections 50 and 77 (3) (i)—Exercise of revisional powers by Financial Commissioner.—Held, that an occupancy tenant who has alienated his rights may recover his tenancy from the landlords after the latter have had the alienation declared void and obtained possession from the alienee, and it is no good answer to such a suit, that the plaintiff is not able to show that he is no longer bound by the contract of alienation.

The references are to the Nos. given to the cases in the "Record."

OCCUPANCY TENANT—*concl'd.*

Held also, that such a suit by a tenant is one for the Civil Courts and not the Revenue Courts to decide.

Held further, that the Financial Commissioner will not exercise his discretionary powers of revision to correct a defect of jurisdiction unless it resulted in injustice or failure of justice.

... .. No. 1 P. R. (Rev.) 1911.

P

PUNJAB TENANCY ACT.

(1) Section 5 (2)—*meaning of occupation for thirty years.*—*Held*, following 5 P. R. (Rev.) 1896, that the period of thirty years referred to in section 5 (2) of the Punjab Tenancy Act, 1887, means thirty years prior to the institution of the suit and not prior to the commencement of the Act.

... .. No. 3 P. R. (Rev.) 1911.

(2) SECTION 77 (3) (k).

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(3) SECTIONS 50 AND 77 (3) (i).

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See *Occupancy Tenant.*

... .. No. 1 P. R. (Rev.) 1911.

(4) Occupancy tenancy alienated by tenant—Tenant suing proprietors for possession after latter have had alienation set aside—Suit cognisable by Civil Courts and not by Revenue Courts.

See *Occupancy Tenant.*

... .. No. 1 P. R. (Rev.) 1911.

R

REVISION (REVENUE).

Financial Commissioner's power of revision only exercised, to remedy injustice or failure of justice.

See *Occupancy Tenant.*

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V

VILLAGE COMMUNITY.

Succession of, to heirless estate.

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Chief Court of the Punjab.

REVENUE JUDGMENTS.

No. 1,

*Before Hon. Mr. A. Meredith, Officiating Financial
Commissioner.*

MAKHAN SINGH AND OTHERS—(DEFENDANTS)—
PETITIONERS,

Versus

NANDA SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Revenue Revision No. 165 of 1909-10.

Occupancy tenancy—alienated—Tenant suing proprietors for possession after latter have had alienation set aside—Jurisdiction of Civil or Revenue Court—Punjab Tenancy Act, XVI of 1887, sections 50 and 77 (3) (i)—Exercise of revisional powers by Financial Commissioner.

Held, that an occupancy tenant who has alienated his rights may recover his tenancy from the landlords after the latter have had the alienation declared void and obtained possession from the alienee, and it is no good answer to such a suit that the plaintiff is not able to show that he is no longer bound by the contract of alienation.

Held also, that such a suit by a tenant is one for the Civil Courts and not the Revenue Courts to decide.

Held further, that the Financial Commissioner will not exercise his discretionary powers of revision to correct a defect of jurisdiction unless it resulted in injustice or failure of justice.

*Revision from the order of Lt.-Colonel O. G. Parsons, Commissioner,
Lahore Division, dated the 13th May 1910.*

ORDER.

The plaintiffs in the present suit, Nanda Singh and others, 10th Nov. 1910, sold their occupancy rights in certain land to some of the proprietors on January 5th, 1907. The remaining proprietors sued for cancellation of the deed of sale and possession on 4th November 1908; they obtained a decree on 26th February 1909 and were put in possession on 6th June 1909. Nanda Singh and the other alienors then sued all the proprietors for possession in a Revenue suit, obtaining a decree on 29th October 1909. The Collector on appeal held that as more than one year had elapsed since the occupancy tenants had been out of possession

they could not claim in a Revenue Court under section 50 of the Tenancy Act. He held the case to be a civil one, and accepting the appeal dismissed the suit. The Commissioner, on appeal, held that the case fell under section 77 (3) (i) of the Tenancy Act, and reversing the Collector's order, confirmed the order of the First Court. He declined to submit the case to the Chief Court for a ruling on the question of jurisdiction, as provided by section 100 (1) (b) of the Tenancy Act. The proprietors have now applied to this Court for revision of the Commissioner's order.

There are three points involved in the case. The first is whether the occupancy tenant is entitled to recover possession of his tenancy, having alienated his rights and the landlords having sued successfully to have the alienation declared void. It was pleaded in the First Court that the plaintiffs having sold their rights could not recover them, and the plea has again been raised on their behalf in this Court. The point was decided very clearly in the Full Bench ruling *Khuda Baksh v. Fazl Din* (1) where it was held that when an occupancy tenant had made an unauthorized alienation of his holding including the giving of possession to the alienee, and the landlord has sued successfully to have the alienation declared void and to recover possession from the alienee, it is not a good answer to a suit by the alienor against the landlord to obtain re-entry on his holding, that the plaintiff is not able to show that he is no longer bound by the contract, either because the alienee has taken back his money, or because the contract has been put an end to in some other way.

The same was held in *Nihal v. Lakhna* (2) and in *Kuria v. Nanak* (3). In the latter case the alienee was one of the landlords and the Financial Commissioner held that as regards the transfer he must be regarded as an outsider and that an alienation to him could not affect the rights of the other proprietors. The plaintiffs-proprietors suing for cancellation of a deed of sale of occupancy rights by a tenant were given a decree with possession as against the alienee only, the rights of the occupancy tenant being held to be unaffected. The present case is in all fours with that decision as far as the question of the rights of the occupancy tenant as against the landlord is concerned.

(1) 17 P. R. 1892 F. B.

(2) 6 P. R. 1893 Rev.

(3) 7 P. R. 1905 Rev.

We next come to the question of jurisdiction, and to the point whether the occupancy tenant is entitled to bring a suit against the landlord for re-entry on his holding in a Revenue or Civil Court. In the first place it is clear that section 50 of the Tenancy Act does not apply to a case in which a tenant has voluntarily alienated his rights. Section 50 applies in two cases only, *viz.*, where a tenant has been dispossessed of his tenancy without his consent otherwise than in execution of a decree or in pursuance of an order under section 44 or section 45, and (2) where a tenant who not having instituted a suit under section 45 has been ejected from his tenancy in pursuance of an order under that section and denies his liability to be ejected. No other case is provided for by this section and the order of the Collector, therefore, was wrong to the extent of applying section 50 to the case at all.

It must then be considered whether it falls under section 77 (3) (i) of the Tenancy Act as held by the Commissioner following the decision of Sir M. Plowden in *Bahadur Ali v. Nihala* (1). The Commissioner considered that this decision was not expressly overruled by *Kesar Singh v. Nihal Singh* (2). The case decided in the latter judgment was referred to a Bench by Sir M. Plowden himself, and at the end of his order of reference he said, "As to No. 104 of Punjab Record 1890, the "decision did not turn upon the length of time which had "elapsed between the plaintiff's dispossession and the suit ; "it is not clear from the files of this Court that the facts raised "in the lower Courts a question like that now before me. "The precise question now raised was not decided in that "case for so far as appears, the plaintiff's suit may have been "brought within one year of his dispossession. Now that the "question has arisen, it is one of sufficient importance to be "considered by a Bench." The question which was subsequently decided by a Full Bench was as follows :—

"Is a suit by a person, who has been dispossessed more "than a year before claim, to recover possession of land from "the proprietor thereof on the ground that he is the occupancy "tenant of the land, a suit falling under section 77 (3) (i) of "Act XVI of 1887, and, therefore, cognizable by the Revenue "Court ?" It was pointed out in the judgment of the Full Bench that the answer to this question depended upon whether the suit could be held to be one between landlord and tenant, or in

(1) 104 P. R. 1890.

(2) 45 P. R. 1891 F. B.

other words, whether a tenancy once established is terminated by the dispossession of the tenant. It had already been held in the previous Full Bench ruling *Joti v. Maya* (1) that to establish the complete relation of landlord and tenant, there must be not only the right to enter upon and hold the land, but also an actual entry into possession. It would seem to follow logically from this, the judgment goes on to say, that the dispossession of the tenant would ordinarily sever the relationship. But section 50 and section 77 (g) of the Act are directly opposed to this theory and effect should, therefore, be given to the intention of the legislature as evinced by the above provisions. The learned Judges were of opinion that full effect would be given to that intention by holding that, for the purposes of the Act, a tenant dispossessed could, for one year from the date of his dispossession, claim to be regarded as a tenant, *quoad* his landlord, his suit for recovery of possession being (as expressly provided) cognizable by the Revenue Court. If he brought no claim within the year, he should be considered to have relinquished his rights to be still regarded as a tenant, and his remedy (if such still existed) should be sought in the Civil, and not in the Revenue, Court.

The words "as expressly provided" show that the learned Judges were referring to sections 50 and 77 (3) (g) of the Tenancy Act, and this is clear from the summarized heading of the judgment. These sections refer to cases of *wrongful* dispossession only, and it would have made matters clearer if this word had been used throughout, to distinguish between the cases referred to in section 50 where the tenant is dispossessed by the action of another and without his consent, and the case in which he voluntarily gives up possession. The question of jurisdiction in this latter case depends upon whether the relationship of landlord and tenant still exists. The point has been fully discussed by Sir M. Plowden in Full Bench ruling, *Joti v. Maya* (1). It was held that the test, under the Tenancy Act, whether a person has or has not become a tenant (with or without a right of occupancy) is whether such person having the right to enter upon and possess particular land, has or has not entered into possession in pursuance of that right. If such person has entered, he is a tenant. If such person has not entered, his suit for entry into possession, whether he claims a right of occupancy or not, is not cognizable

by a Revenue Court, but by a Civil Court only. *Khuda Bakhsh v. Fazl Din* ⁽¹⁾ already referred to was a suit brought by an occupancy tenant against the landlord for recovery of his holding which had passed into the defendant's hands by reason of the tenant having mortgaged his rights with possession to a third party against whom the landlord had succeeded in a suit to declare the mortgage void and to obtain possession from the mortgagee. It was a case exactly similar to the present one, and Mr. Justice Rivaz, in referring the case to the Full Bench, remarked that in accordance with the recent Full Bench ruling such a suit was cognizable by the Civil and not by the Revenue Courts, and that Civil judgment *Bahadur Ali v. Nihala* ⁽²⁾ which decided to the contrary, must be held to be overruled. The case quoted in the margin as that of the Full Bench ruling referred to is *Kesar Singh v. Nihal Singh* ⁽³⁾, though it would have been more correct to say *Joti v. Maya* ⁽⁴⁾. It is, however, clear that an occupancy tenant, who has mortgaged or sold his tenancy with possession, the landlord subsequently succeeding in a suit to declare such sale or mortgage void, cannot sue the landlord for re-entry on his holding in a Revenue Court; he neither has possession nor can he be said to hold under the landlord in any way; he is no longer a tenant, and his remedy lies in a civil suit. I do not, therefore, agree with the Commissioner that the suit should have been heard in a Revenue Court though I agree that the occupancy tenant was entitled to a decree for possession against the landlord.

It is, however, unnecessary for me to interfere on the revision side, as the decision is a right one though there is a defect of jurisdiction. It was held by Sir Lewis Tupper in *Jaimal Singh v. Sher Khan* ⁽⁵⁾ that the Financial Commissioner of the Panjab uses his discretionary powers in the interests of justice only in those cases where he is satisfied that his declining to interfere would result in injustice or failure of justice. The same has been recently held by my learned colleague in *Imam Din v. Jiwan* ⁽⁶⁾ and is the course usually followed in this Court. The application for revision is, therefore, rejected. No costs as the question of jurisdiction was a proper one for decision.

Application rejected.

⁽¹⁾ 17 P. R. 1892.

⁽²⁾ 104 P. R. 1890.

⁽³⁾ 45 P. R. 1891 F. B.

⁽⁴⁾ 44 P. R. 1891 F. B.

⁽⁵⁾ 5 P. R. 1903 Rev.

⁽⁶⁾ 2 P. R. 1910 Rev.

No. 2.

Before Hon. Mr. J. M. Douie and Hon. Mr. A. Meredith,
Financial Commissioners.

WAZIRA AND OTHERS—(PLAINTIFFS)—APPLICANTS,

Versus

MANGAL AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Revenue Revision No. 148 of 1909-10.

Custom (Succession)—heirless estate—village community—escheat to Crown—Hindu law

Held, that the following propositions are applicable to the subject of escheat to the Crown:—

1. The right of the Crown to claim escheat rests not on customary or Hindu law, though Hindu law recognizes escheats, but on grounds of general or universal law.
2. The right can only arise in the absence of relations entitled by law or custom to inherit.
3. The right of the proprietary body as a whole to succeed in cases in which it exists is primarily based on real or assumed relationship to the holder of the land, or to the member of the proprietary body from whom his title was derived.
4. Such a right should be assumed in the case of homogeneous estates or sub-divisions of estates, where the owners are all or nearly all of the same tribe as the last holder of the land or the member of the proprietary body from whom he derived his title.
5. It should not be assumed in the case of heterogeneous estates or sub-divisions of estates held by persons of different tribes or different *gots* of the same tribe. The presumption in such cases is that the State has a right of escheat.
6. When the property in the land was originally derived by gift from a member of the tribe of the original proprietary body the right of the body should be recognized on failure of the donor's and donee's lines.
7. In any case in which the *wajib-ul-arz* declares the right of the proprietary body to succeed to the land of heirless owners Government should set up no claim.

Held accordingly, that the heirless land concerned being situate in Patti Mohra of Mauza Kalia, Thanesar tahsil, Karnal District, a village owned by an utterly heterogeneous proprietary body, where even the Jat proprietors are of different *gots* both in the village as a whole and in the patti concerned, and the land having been owned originally by a Jat of a *got* of which he was the only representative in the village, and having been held after his death by his wife's nephews belonging to a village in the Ambala District, that there was no possible claim of succession in the proprietary body of the village or the patti as a whole or in the Jat proprietors separately, and it must be held that the land escheats to the Crown and must be recorded as Government property.

Case reported by Major C. H. Buck, I. A. Deputy Commissioner, Karnal, under Section 16 of the Land Revenue Act, XVII of 1887, with his letter No. 375 G., dated the 25th February 1910.

Kharak Singh for Jats of *Patti Mohra*.

Narinjan Das, Government Pleader, for Crown.

Reference by Major C. H. Buck, Deputy Commissioner of Karnal :—

Under section 16 Land Revenue Act, I refer the following case for orders, as there appears to be no definite law or ruling on the subject.

One Musammat Kishni, widow of Partapa, Jat of Kaliana, *Tahsil* Thanesar has died and leaves no blood relations of her own or her husband. She owned 82 *bighas* 4 *biswas* land.

The tenure of this village is *pattidari ghair mukammal*, and the *shamilat deh* is not divided among *pattis*; each owner has a share in the common land according to his holding.

There is no provision in the *wajib-ul-az* regarding disposal of land of a proprietor who dies without relations.

The village was originally occupied by one Muvia, Jat. He introduced persons of miscellaneous castes and finally four *pattis* were created under *lambardars* Dhan Singh, Alman, Mohra, and Noda, and *shamilat deh* was set apart.

The land in question was in 1848 owned by one Rai Singh, son of Ramdiya, Jat and he or his son apparently married the sister of one Sahib Singh, an outsider. When her husband died the three sons of Sahib Singh succeeded and are shown in Mr. Douie's Settlement as owners. They were Tulsī, Parsa and Partapa. The two latter died childless and Musammat Kishni succeeded to the estate when her husband, Partapa, died. She has now died and the question of mutation has arisen.

There are four so-called *pattis*, viz. Dhan Singh (Jats) Alman (Fakirs and Jats), Noda (Jats and Malis), and Mohra (Arains and Jats).

The land in question is situate in the Mohra *patti*, and the *Tabsildar*, without any good reason, ordered that mutation take place in favour of the Jats of the Mohra *patti*. This is evidently wrong.

The question is whether the land should become *shamilat* of the *Patti Mohra*, of the whole village, or whether it should escheat to Government.

Section 28 of Rattigan's Customary Law (Remark 1) tends to show that it should escheat to Government, but Roe and Rattigan's Tribal Law in the Punjab (page 87, Chapter III, paragraph 5) tends to show that it should pass to the *shamilat deh*. The owners of the *Patti Mohra* have no special right as against the general proprietors of the village.

As these cases are likely to become common, owing to the numerous deaths which have occurred by plague, and as I believe in other instances such land has been allowed to pass to the remaining proprietors as *shamilat deh* or *patti*, I refer the matter for orders.

The mutation proceedings are sent herewith.

The order of the Court was delivered by—

17th Jan. 1911.

J. M. DOVIE, Financial Commissioner.—This case relates to mutation of ownership in 82 *bighas 4 biswas* in *Mauza Kaliana* of the *Thanesar tahsil* of the *Karnal District*. At the Regular Settlement about 1850 the land was held by one *Rai Singh*, son of *Ramdia*. Apparently before the end of that settlement *Rai Singh* died and was succeeded by his son *Budha*, tribe *Jat*, got *Barthal* (*khewat* No. 31). In making his reference for revision the Deputy Commissioner stated that *Rai Singh* or his son *Budha* married the sister of one *Sahib Singh*, whose sons became possessed of the holding. To-day it is stated that *Budha's* mother and *Sahib Singh's* wife were sisters, and that *Sahib Singh* belonged to a village in the *Amballa District*. All his sons died childless, but one left a widow, *Musammatt Kishni*, who has now died. The land is in one of the four *pattis* into which the estate is for revenue purposes divided, namely in *Patti Mohra*, the owners of which are *Jats* and *Arains*. The Settlement *Tahsildar* found that no one had proprietary possession. He treated as fraudulent a claim put forward by or on behalf of one *Devatis*, a *Jat* of a village in *Tahsil Kaithal*, and he ordered mutation in favour of the *Jats* of *Patti Mohra*. The *Arains* of that *patti* appealed to the Collector on the ground that mutation should have been effected in the names of all the owners of *Patti Mohra* irrespective of tribal distinctions. The Deputy Commissioner remarked that the question for decision was whether the land should be recorded as *shamilat* of *Patti Mohra* or should be entered as belonging to Government by escheat. Instead of deciding the appeal, he irregularly reported the original order for revision. The question being one of importance I transferred the case to my own file by an order under section 16 (1) of the Land Revenue Act. I have heard counsel for the *Jat* owners and for the Crown,

A glance at the genealogical trees of the settlements of 1885 and 1909 will show how utterly heterogeneous the proprietary body of this village is. The owners are of several tribes, and even the Jats are of very different *gots* both in the estate as a whole and in *Patti* Mohra. In the *khewat* of the Regular Settlement (1855) Budha, from whom the late owners derived their title, was, as I have noted, shown as a Jat, *got* Barthal and was probably the only landowner of that *got* in the village. Budha's successors had nothing to do with the proprietary body till they were brought into it on Budha's death without male heirs. The account of the founding of the estate given in the note attached to the genealogical tree of the 1885 settlement is significant,

"At first the whole area of the village was in the occupation of the Sikhs, and tenants belonging to neighbouring estates cultivated the land. About 125 years ago one Munia, Jat Gil, on account of inconvenience left the old *abadi* near the G. T. road and with the permission of the authorities of the time came to settle in the village paying no *nazrana* or *malikana*. His pedigree table is not known to the owners (*silsila shajra nasb malikan bata nahin sakte*). He alone remained in possession for a considerable time. Failing to arrange for the cultivation of the whole area he brought persons of different tribes from the old *abadi* and united them with him in the ownership of the land."

According to the *shajra nasb* of 1885 there are a few Gil Jats in each *patti*, but whether any of them are descendants of Munia we cannot say. Even if they were, it would be difficult to allege that the ancestor of Budha, *got* Barthal, derived his title from a gift by Munia. The petty Sikh sardars, who occupied the country after the sack of Sirhind in 1763, no doubt welcomed any one who would settle and cultivate, and so increase their income.

About 1882 the Government of India made enquiries regarding escheat in the different provinces of India. A reference was made to the Judges of the Chief Court and minutes by Mr. Justice Barkley and Mr. Justice W. H. Rattigan will be found reproduced in Punjab Government Consolidated Circular No. 9. Mr. Justice Barkley wrote :—

"Escheats are comparatively rare in the Punjab. One reason is that where the land is generally held by village communities, as is the case in this province, it is the usual practice to recognise the succession of the proprietary body to the lands

“ of proprietors dying without heirs, and this is often provided for
“ in the village administration papers prepared at settlement. In
“ the southern Punjab under Sikh rule, when wells rather than
“ villages formed the proprietary units in direct relation with
“ the Government, escheats were more strictly enforced than
“ they are now, and the result was that wells or portions of wells
“ with the lands attached to them often become the property
“ of Government. Mr. O'Brien while reporting that he can dis-
“ cover only two cases of escheat which have taken place (in the
“ Muzaffargarh District) since British rule, adds that the British
“ Government at present owns numerous estates in the district
“ which it received from the Sikh and Patban Governments, to
“ whom they had escheated for want of heirs. A similar state of
“ things exists in the neighbouring district of Multan, though in
“ that district also escheats are now rare, it being stated that no
“ escheats of immovable property have taken place within the
“ last ten years.”

Mr. Barkley then discussed the law on the subject, pointed out that escheat was not one of the matters in regard to which the personal law of the parties is made applicable by section 5 of the Punjab Laws Act and referred to a leading Madras case in which the Privy Council held that the title of the State rested not on the Hindu law of escheat, but “ on grounds of general or universal law.”

Mr. Justice Rattigan quoted further cases, and concluded that “ when there is a total failure of heirs the Crown takes
“ by escheat under a general or universal law as paramount
“ power.”

In a letter No. 692, dated 28th July 1882, addressed to the Government of India, the Punjab Government remarked :—

“ The right of the Crown to succeed by escheat upon a total
“ failure of heirs to all movable and immovable property left by
“ Hindus and Muhammadans has always been recognized and
“ asserted in the Punjab.” (It then noted what the law as laid
down by the Privy Council was.) “ Cases of the kind, however,
“ have been comparatively rare. A total failure of heirs is neces-
“ sarily uncommon under Hindu law and the principle upon
“ which the revenue settlement has been made in this province,
“ renders an escheat of landed property belonging to the agri-
“ cultural population almost impossible, the general village pro-
“ prietary body succeeding as a matter of right to the estate
“ of any proprietor dying without natural heirs.”

Two Delhi, two Rohtak and two Muzaffargarh escheats were noted, the Rohtak cases probably did not relate to land.

The only district in the Punjab in which escheats have been at all common is Kangra. The description of the origin of the tenures of that district given in paragraphs 150—152 of the Settlement Manual shows clearly why this should be the case. A quotation may be given from paragraph 2 of Financial Commissioner's No. 6521, dated 30th October 1906.

“It is the policy of Government to assert its claim to an escheat only in cases where it is clearly established that there is an entire failure by any person to establish a claim to the succession. In that correspondence it was also established that there was, as a general rule at least, no such community of interest between the proprietors of a village (in Kangra) as would entitle them to succeed to heirless land as a body, while as regards the proprietors of a *tika* any claim they might have, would be founded on the presumption that they are distant relatives of the last owner, and not on the fact of their being proprietors in the *tika*.” With the above may be compared *P. R. No. 61 of 1898*, (1)

I will now refer to certain cases of escheat elsewhere. In 1892 one of the four *tarafs* of *Mauza* Bachewind in Amritsar was supposed to have been left heirless, and escheat was enforced, the claim of the headmen to have the land declared to belong to the whole village community being overruled by the Deputy Commissioner [Rev. Pro. (Genl.) No. 18 of August 1892]. The *taraf*, which escheated, was owned by Jats of the Khaira *got*, and the other three *tarafs* by Jats of the Sohal *got*. The case was reported to Government in order that sale might be sanctioned. Meanwhile, however, the Deputy Commissioner discovered heirs of the last owner, and the case was dropped [Rev. Pro. (Genl.) Nos. 1-4 of December 1892]. Here then Government claimed an escheat as against the claim of the general proprietary body. In 1897 the Deputy Commissioner of Sialkot ordered escheat of one-fourth of the village of Jhang in the Sialkot District. The village was founded by Rukwal Rajputs, who came from Pahladpur in Jammu. Lala, Rukwal Rajput, was sole owner in 1852, when he sold one-fourth to Mahajans, and one-half to Rukwal Rajputs. The escheat occurred through the failure of heirs to Lala. The claims of certain Rukwal Rajputs of Pahladpur, of the representatives of the Rukwal vendees of one-half the estate (*Tarafs* Shaman and Jholan), of the representatives of the Mahajan vendees of one-fourth

(1) 61 P. R. 1898 (*Shaman v. Sardha*).

(*Taraf Diwana*), and of the *ālā malik* of the land, were all disallowed. The facts connected with the escheat were carefully considered by the Financial Commissioner, who held escheat to be proper, and when proposing sale submitted the correspondence to Government. Sale was sanctioned by Punjab Government No. 331, dated 5th June 1897. In 1901 the Deputy Commissioner of Lahore proposed to sell certain land which had escheated in *Mauza Bath*. The Government asked whether the Government title was clear with reference to Consolidated Circular No. 9. The Deputy Commissioner replied: "The possession of the land was taken over in 1896-7. Since then no one has come forward and represented his claims to the land. The fact is that neither Musammāt Dhanwanti nor her husband had any collateral relatives in the village or its vicinity." The area was small, 42 *kanals* 5 *marlas*. The order was that the land should be offered to the proprietors of *Mauza Bath* at the estimated value (Punjab Government No. 1156, dated 23rd November 1901.)

An important case bearing on the question is *P. R.* No. 77 of 1896 ⁽¹⁾. A widow of a *Kalal* having a life interest in land in *Mauza Ambala* executed a deed of gift in favour of her brother's son. After her death the other proprietors in the *thula* claimed to succeed, but the Court held they had no *locus standi*. Two of the cases which the counsel for the Jats has referred to, No. 80 of 1885 ⁽²⁾ and No. 78 of 1888 ⁽³⁾, were considered. The decision in both was held to be irrelevant, as the claim upheld was in each case based on relationship. Mr. Justice Chatterjee remarked ⁽¹⁾ :—

"There is also a passage in Mr. Justice Roe's well known work, *Tribal Law in the Punjab*, page 87 in which it is stated that 'when one group of proprietors in a village community becomes extinct their rights pass to the surviving groups, there must always be heirs as long as any member of the community survives.' This is the strongest authority in plaintiffs' favour, but the principle stated in it, is controverted by the learned author of the *Digest of Customary Law*. See Remark 1, Section 23, 5th Edition.

"On the whole we do not think that it has ever been definitely decided by this Court that the members of a village community are the ultimate heirs of any co-sharer among them, who dies

⁽¹⁾ 77 *P. R.* 1896 (*Kirpa Ram v. Ude Ram*).

⁽²⁾ 80 *P. R.* 1885 (*Mt. Bhupia v. Jamna Das*).

⁽³⁾ 78 *P. R.* 1888 (*Lehna v. Kishen*).

“ without heirs, in every instance without regard to the constitution
 “ of the village or the facts of the particular case which comes up
 “ for decision.

* * * *

“ Ambala is a town with a heterogeneous class of inhabitants
 “ and the owners of *Patti Kalalan* are also a mixed body. One
 “ *thula* consists of Jat proprietors of four different *gots*. The
 “ three *Kalal thulas* have owners belonging to six *gots*, and the
 “ division into *thulas* appears to have been made for revenue pur-
 “ poses, and is not based on ancestral connection among the
 “ land-holders.

* * * *

“ The tenure of the village is stated in the *wajib-ul-arr* of
 “ 1852-53 as *kabzawar* and it is recited that there is nothing held
 “ in common in the entire *patti* but 54 *bighas* of *shamilat* land.
 “ In our opinion it would be difficult to hold that the owners of
 “ *patti Kalalan* of the city of Ambala are such a compact and
 “ homogeneous community that the rule of succession set up by
 “ the plaintiffs must be presumed among them in the absence of
 “ affirmative evidence on the present record.

* * * *

“ The defendant Ude Ram is in possession, and plaintiffs in
 “ order to recover the land from him must show a superior right.
 “ This they have failed to do.”

In this case therefore it was held that the *thuladars* had no title
 to contest a gift which was *prima facie* invalid. It follows clear-
 ly, that if the State had claimed escheat, the *thuladars* could not
 have contested the claim.

P. R. No. 61 of 1898 (1) is a similar case relating to the
 Kangra District. It was maintained that “ under circumstances
 “ like the present the proprietary body of the village or of the
 “ subdivision in which the land is situate are by the general
 “ custom of the Punjab entitled to succeed on the death of the
 “ widow, and that they have in consequence a sufficient *locus*
 “ *standi* to contest the widow’s alienation.” As to this Mr. Justice
 Chatterjee remarked :—

“ With reference to the first point we are unable to accede
 “ to the contention that there is a universal custom of the kind
 “ mentioned in the Punjab The authorities on the subject are

(1) 61 *P. R.*, 1898 (*Shaman v. Sardha*).

“ conflicting. They are all collected and reviewed in No. 77
 “ *Punjab Record*, 1896 and the conclusion arrived at was that no
 “ such general rule could be laid down. Counsel insists that this
 “ is an error, but we are unable to agree with him. Admitted-
 “ ly the authorities are not agreed on the point and opinions in
 “ support of appellant’s view are opposed by others entitled to
 “ equal weight affirming the contrary. It appears to us difficult
 “ to lay down a rule of general application in a matter of this
 “ kind merely upon *à priori* grounds. Much would depend upon
 “ the facts of each case and the constitution of the village. In
 “ a village held on a strictly tribal tenure, or in which the
 “ community is a compact one, the probability is that heirless
 “ land would be taken possession of by the tribesmen or the
 “ community, and that strangers would be excluded. It would
 “ perhaps be reasonable to presume even in the absence of actual
 “ instances that in the past, and particularly in unsettled times,
 “ they were able to assert and enforce this right with the support
 “ of public opinion, and if necessary by physical force. The
 “ right of escheat would have an historical foundation in such
 “ communities. But no such inference can be drawn where the
 “ proprietors are a heterogeneous body, and where possession is
 “ essentially the measure of right. Here the right of escheat
 “ ought to be affirmatively established by cogent evidence. It
 “ would not always be safe to assume the existence of such right
 “ merely because under the existing revenue system there is a
 “ joint liability for revenue, or where such land exists, because
 “ there is some common waste land for pasture and other pur-
 “ poses. In many cases, as shown in No. 77 *Punjab Record* 1896
 “ (1) it was found on actual enquiry that the right did not exist.
 “ Considering the diverse character of village tenures in this pro-
 “ vince, it is obviously unsafe to formulate a general rule on the
 “ subject of escheats to village proprietors. We therefore see no
 “ good reason to differ from the view taken in the case above
 “ cited.”

In *P. R.* No. 102 of 1906 ⁽²⁾ the principle laid down in *P. R.* No. 77 of 1896 ⁽¹⁾ was applied. Mr. Justice Lal Chand remarked :—

“ In the present case the tenure of the village concerned
 “ is *bhaiachara*, the proprietary rights are held by a heterogene-

(1) 77 *P. R.* 1896 (*Kirpa Ram v. Ude Ram*).

(2) 102 *P. R.* 1906 (*Harnam Singh v. Partap Singh*).

“ous body of miscellaneous tribes, and the plaintiffs are Rors
“by caste, while Nanna, whose property is in dispute, was a
“Jat. There is, therefore, no reason for holding that the constitu-
“tion of the village or the facts of the case raise any sort of ini-
“tial presumption to support plaintiff's allegation of succession
“by reversion.” It follows that, assuming Nanna really to have
left no relations having a right to claim his land, Government
was entitled to his land by escheat.

The following propositions may, I think, be laid down on the
subject of escheats to the Crown :—

- (1) The right of the Crown to claim escheat rests not on customary or Hindu law, though Hindu law recognizes escheats, but on grounds of general or universal law.
- (2) The right can only arise in the absence of relations entitled by law or custom to inherit.
- (3) The right of the proprietary body as a whole to succeed in cases, in which it exists, is primarily based on real or assumed relationship to the holder of the land, or to the member of the proprietary body from whom his title was derived.
- (4) Such a right should be assumed in the case of homogeneous estates or sub-divisions of estates, where the owners are all or nearly all of the same tribe as the last holder of the land or the member of the proprietary body from whom he derived his title.
- (5) It should not be assumed in the case of heterogeneous estates or sub-divisions of estates held by persons of different tribes or different *gots* of the same tribe. The presumption in such cases is that the State has a right of escheat.
- (6) When the property in the land was originally derived by gift from a member of the tribe of the original proprietary body, the right of that body should be recognized on failure of the donor's and donee's lines,
- (7) In any case in which the *wajil-ul-arz* declares the right of the proprietary body to succeed to the land of heirless owners Government should set up no claim.

It should be assumed in dealing with all such cases that Government will recognize the right of the proprietary body to succeed, where it can set up any sort of probable title. Where escheat is clearly claimable it should be enforced. But in that case it will usually be a right to propose sale of the land at its market value to a member of the proprietary body or to the proprietary body as a whole. In the present case escheat was certainly claimable and the land will be recorded as Government property.

Appeal rejected.

No. 3.

*Before H. J. Maynard, Esquire, Officiating 2nd
Financial Commissioner.*

CHHAILU AND OTHERS—(PLAINTIFFS)—APPLICANTS,

Versus

MAN SINGH AND ANOTHER—(DEFENDANTS).—
RESPONDENTS.

Revenue Revision No. 106 of 1910-11.

Punjab Tenancy Act, XVI of 1887, section 5 (2)—meaning of “ occupation for thirty years.”

Held, following 5 P. R. 1896, Rev., (1) that the period of thirty years referred to in section 5 (2) of the Punjab Tenancy Act, 1887 means thirty years prior to the institution of the suit and not prior to the commencement of the Act.

Revision of the order of C. A. Barron, Esquire, Collector of Delhi, dated 5th July 1910—Case forwarded by Lieutenant-Colonel C. M. Dallas, Commissioner of the Delhi Division, with his order, dated 17th March 1911, for orders under section 84 (3) of the Punjab Tenancy Act, 1887.

Dwarka Parshad, for applicants.

Kalvant Sen, for respondents.

The order of the Court was as follows :—

I have heard Lala Dwarka Parshad for the applicants and 2nd August 1911, Lala Kalvant Sen for the respondents. I deal with the three cases 106-108 in a single order.

The legal question on which these cases turn is the decision of the Collector of Delhi that the words “ thirty years ” in section 5 (2) of the Punjab Tenancy Act mean “ thirty years ” from the commencement of the Act, and not thirty years from the date of the institution of the suit, as held by the Financial Commissioner in Judgment No. 5 of 1896. I note in passing that the Revenue Courts are bound to follow the rulings of the Financial Commissioner, until they are overruled by that officer himself. But it is open to me to distinguish, or to overrule, the ruling referred to, for adequate reasons : and I shall therefore proceed to consider whether adequate reasons exist.

The Collector of Delhi appears to me to have gone astray from failure to distinguish between a rule of evidence and a rule of substantive law. He is quite right in holding that

(1) 5 P. R. 1896 Rev. (*Maula v. Jivan Bakhsh*).

the framers of the present Tenancy Act did not intend to allow the particular form of title which accrues under section 5 (1) (a) to accrue after the passing of the Act of 1887. But the framers of the Act recognised that they would be throwing very great, and perhaps unreasonable, difficulties in the way of claimant tenants, if they insisted upon their giving affirmative proof of the lapse of a certain number of generations in possession of the land. They therefore introduced a rule of evidence, which establishes a presumption in favour of the lapse of the required number of generations *prior to 1887*, provided that a certain set of facts in the thirty years *prior to the institution of the suit* be proved by the tenants. That presumption is not absolute. It is rebuttable either by evidence to be adduced by the other side, or by facts in the tenant's own statement of his claim which are manifestly irreconcilable with the requirements of section 5 (1) (a). And, moreover, the strength or weakness of the presumption, is a matter for the decision of the court, according to the circumstances of the case.

Let us see now how the law, as thus explained, applies to the facts of the three cases under consideration. And in the first place let me note that the revenue records show plainly that there is no justification whatever for the Collector's suggestion that the land in dispute is not identical with the land held by the applicants' representatives in 1874. It unquestionably is the same land. It appears then that this land was cultivated by the owners themselves in 1842 A. D., that in 1874 Hans Ram, the father of some, and the uncle of other, tenants was in possession of it, and that in 1887 the present tenants were in possession. Between 1842 and 1874 we have no information, and there is nothing to prove that Sanwant, the father of the tenant Hans Ram, ever held possession. If section 5 (2) did not exist, we should have to say to the tenants: you have proved possession at revenue rates since 1874, and you have proved possession at revenue rates in the second generation in 1887. But since you cannot prove that your grandfather Sanwant was in possession at some period between 1842 and 1874, you have failed. If we accept the Collector's view of the meaning of section 5 (2), the law is equally rigid. In this event, our reply to the tenants is that they fail, because they cannot prove what happened between 1857 and 1874, a period in which records of rights were only intermittently made and maintained.

What the legislature has done is to give a practical relaxation to a very rigid rule of substantive law by adopting

an elastic rule of evidence, which the Courts will apply according to the circumstances of the case. As time goes on it will become more and more easy to rebut the presumption arising under section 5 (2), by reference to the excellent and continuous records of rights which began to be maintained in the later eighties, and there is no fear at all that the sub-section as interpreted by ruling No. 5 *P. R.* of 1893 (1) will become a means of frustrating the expressed intention of the legislature in respect to the prospective accrual of occupancy rights under section 5 (1) (a).

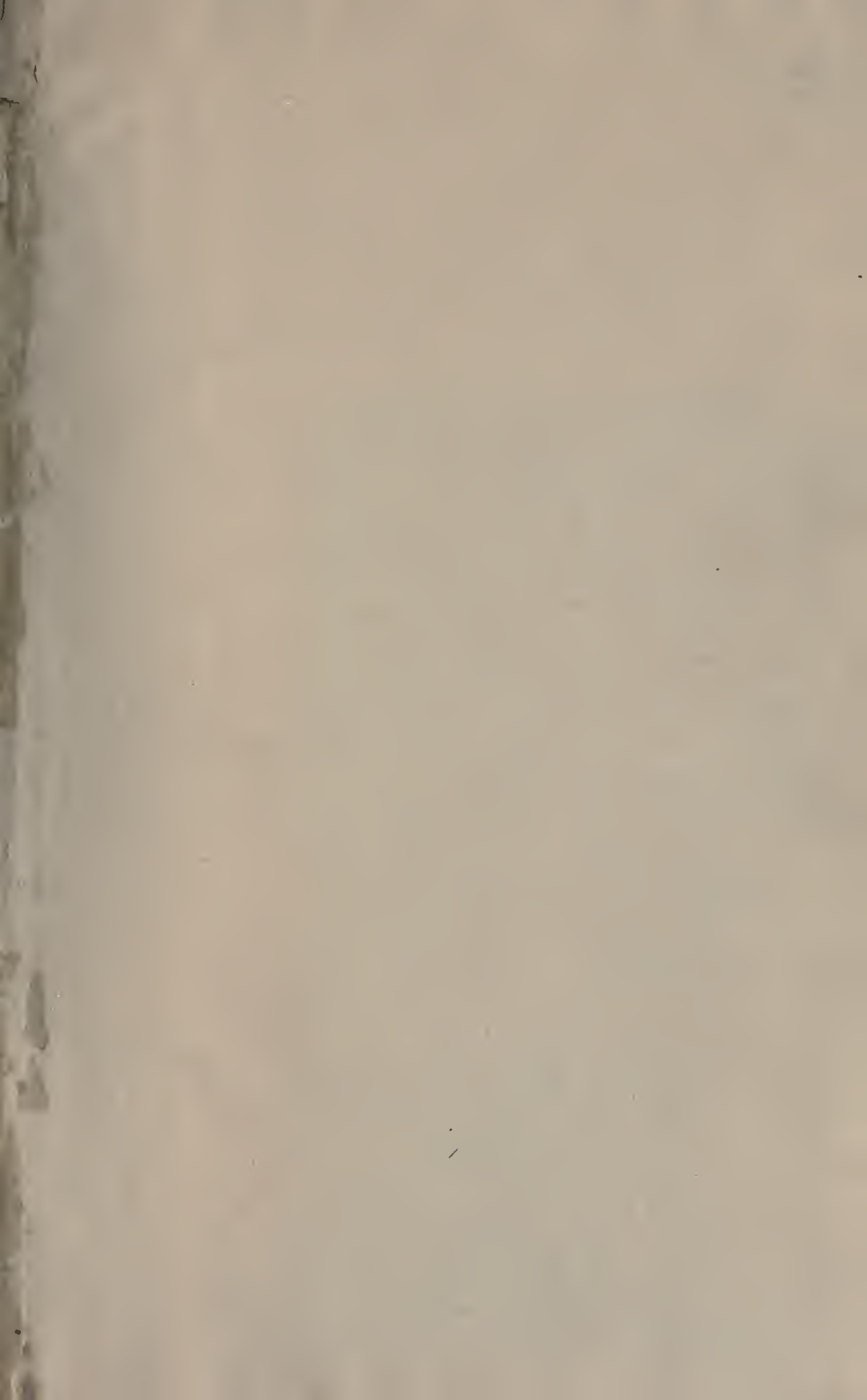
I unquestioningly adopt and endorse ruling 5 *P. R.* of 1896(1), and hold that in the present cases, the proof that the tenants have held at revenue rates since 1874 entitles them to the benefit of the presumption arising under section 5 (2). They have, in fact, proved everything required by section 5 (1) (a) except Sanwant's possession and that possession may have been a fact at any date between 1842 and 1874. The only evidence adduced by the other side to disprove it is an entry showing that Sanwant's son, Mukh Ram, was recorded in 1842 as the owner of certain other land. It would not, in my opinion, be safe to infer from this isolated fact that Sanwant himself was undoubtedly dead in 1842.

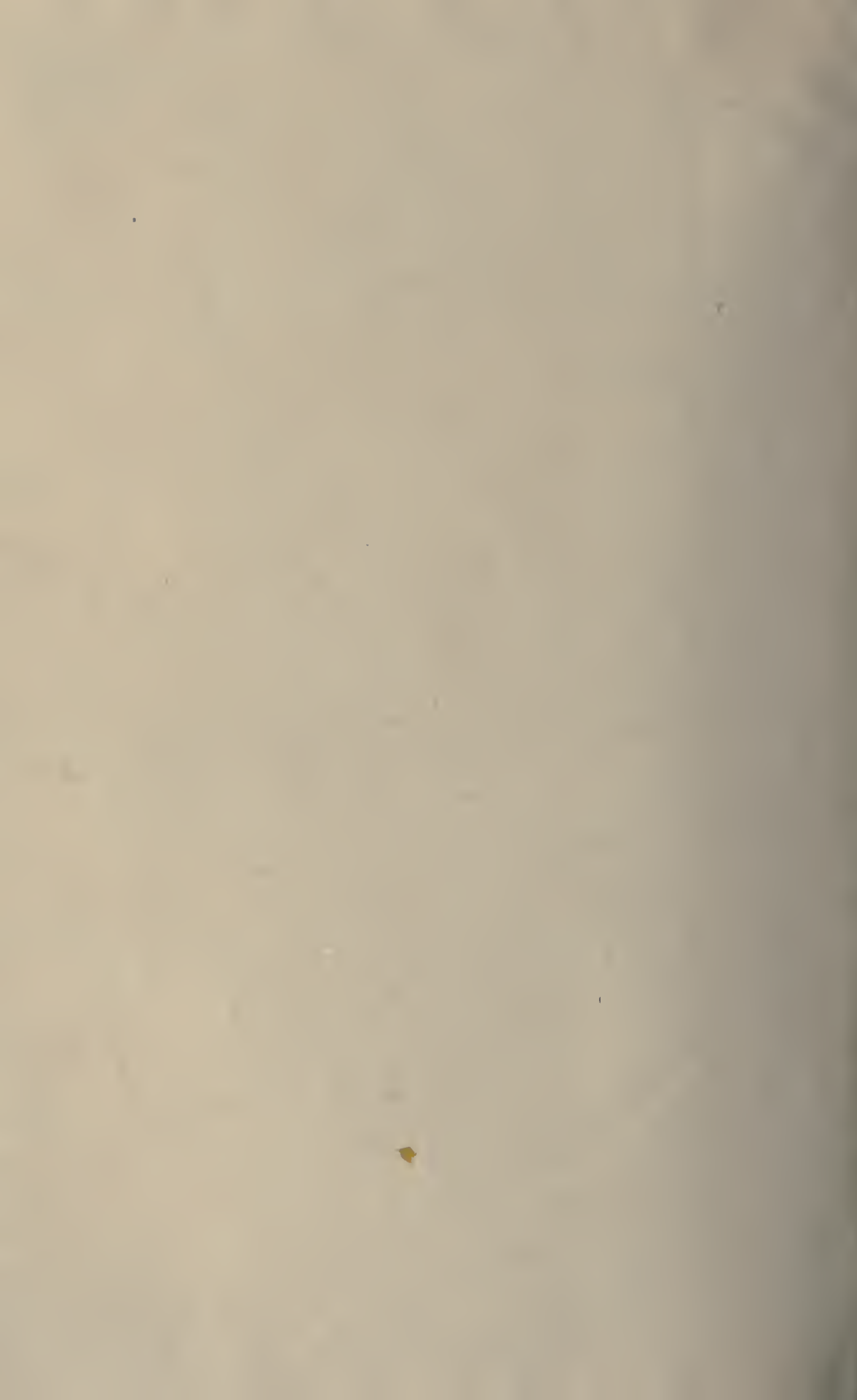
Not only is ruling No. 5 *P. R.* of 1896 (1) thoroughly sound and coherent in itself, but it works very equitably in its application to the present and the numerous similar cases in which the old revenue records are intermittent and incomplete. The Commissioner suggests that different portions of the ruling are conflicting. But if he will realize the distinction between a rule of substantive law and a principle of evidence, I think the supposed contradictions will disappear. When the tenant has proved thirty years possession at revenue rates prior to the institution of the suit, the Court may presume that on the 1st November 1887 he had held for more than two generations. But the presumption would be so weak as to be quite valueless, unless there were also proof that he was in possession on November 1st, 1887, a period at which records of rights begin to become continuous and reliable. And in any event the presumption is capable of being rebutted. For instance I have just had a case before me in which a tenant's own allegations showed that, though he had held possession at revenue rates

(1) 5 *P. R.* 1896 Rev. (*Maula v. Jiwan Baksh*).

for thirty years at the date of the suit, the generation which held the tenancy in 1887 was not the third generation which had held it. He therefore failed to establish a claim under section 5 (1) (a), notwithstanding the presumption which arose in his favour under section 5 (2). Revising the original orders of the Assistant Collector and the appellate orders of the Collector in all three cases, I decree the claims of the tenants, applicants for revision, in all three. I pass no order as to costs.

Revisions accepted.





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The Punjab record

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